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CURRENT EVENTS.

ABUTTING PROPRIETORS—DELEGATED POWERS OF TAXATION.—It has often occurred to us that legislatures, especially in the western States, are entirely too liberal in delegating to municipal corporations the power of taxation. That power is the highest that can be exercised in any constitutional government. In the language of Chief Justice Marshall, "The power to tax is the power to destroy," and it is manifestly the duty of the legislature, the body in which this power is primarily vested, to see to it that it is not abused, either by itself or by the bodies to which it may be delegated. We are strongly inclined to suspect that this duty is often neglected, or very imperfectly performed; that legislatures do not exercise proper discretion, either in framing general laws or special charters of incorporation; that unduly extensive powers are granted to municipal bodies, which, being freely exercised, occasion to innocent persons serious injury and loss. It is a matter of general complaint that the affairs of municipal corporations are in a great measure controlled by men usually denominated "ward politicians," who are said to be greedy, unscrupulous, unmindful of the interests of the community and intent only upon personal gain, and that, through their machinations, waste, extravagance, improvidence and corruption pervade the financial affairs of many cities and towns. Under these malign influences the burden of taxation upon city property is increased out of all measure of proportion to that borne by other property; municipal debts are piled up; city bonds, thick as leaves in Valombrosa, are issued; costly public improvements of doubtful utility are made, which yield the maximum of profit to the contractors and the minimum of benefit to the community; certain localities are loaded with the munificence of the so-called "city fathers," who treat other regions as if they were merely stepchildren. From all these causes result not only a chronic state of dissatisfaction and discontent, but, it is alleged, serious loss and injury to the misgoverned community. How true these charges are, either generally or specially, it is not for us to say, but the fact that such charges *are* made, and so generally made, should impress legislatures with a sense of their duty to limit, as far as the power yet remains to them, the improper or hurtful exercise of municipal functions.

We have been strongly impressed by the number of cases we find in the current reports of the day, in which a town or city on the one hand, and "abutting proprietors," so-called, on the other, are the parties, and with the further fact that in nearly every instance the town or city proves the victor in the forensic strife. These actions usually relate to "tax-bills," "assessments," or charges under some other name, against the proprietor to defray the cost of street improvements in front of his property. These are taxes levied by the delegated taxing power of cities, not upon the general mass of the property subject to their jurisdiction, nor yet upon definite subdivisions of the city, as wards or districts, but upon specific and limited regions which are supposed to need certain improvements, the cost of which the proprietors are presumed to be able to pay. It is always assumed that the assessed proprietor really loses little or nothing by the payment of his assessment, being reimbursed by the enhancement of the value of his property or the increased convenience afforded by the improvement, or by both. This may be or may not be, at any rate, as other citizens and the city generally enjoy the advantages of the improvement, it is merely just that such citizens, or the city for them, should defray a due proportion of the expense, especially as the "abutting proprietor" may be presumed to have fully paid his regular taxes. We are aware that under the conditions of modern town and city life it is almost or quite necessary that the authority to levy special assessments of the character we have indicated should be lodged somewhere, and that proceedings under it are usually in accordance with "due process of law," but we think, nevertheless, that the exercise of that power is extrahazardous, often fraught with serious danger to private interests, and operating gross injustice to innocent persons.

At the best the system of assessing abutting proprietors for benefits is simply a mode of taxation, irregular and abnormal; it makes no pretense to equality, which, in all other forms of taxation, is recognized as the test of justice; it applies to no large classes of persons. The corporation selects a dozen persons, more or less, and says to them, "You shall pay, in addition to your other taxes, such a per cent. on the assessed value of your lots for proposed street improvements." No such demand is made of persons who own similar lots on the streets north, or those south of the street in question. If any one from whom the demand is made refuses to comply with it, he is compelled to pay. This is the law in most of the cities and towns of the country, but the question remains, is such law just and reasonable, and is it fairly administered? Have the legislatures of the States done well their duty in permitting the existence of such laws?

As we have already intimated, we regard the system of making street improvements by means of local assessments as too firmly established to be now overthrown, but we think, nevertheless, that it still remains in the power of legislatures to mitigate the evils which in their zeal for "progress" and improvement they have permitted to become possible. Of course, it is only right that owners of property in cities and towns should pay for the benefits they derive from municipal government. And they do pay—roundly. Ordinary municipal taxes are onerous almost everywhere, and complaints of them are loud and bitter. Of this we have nothing to say; it is the fate of civilized man to be taxed, and, as a rule, if he suffers from no heavier burdens than others, he has no cause of complaint. It is the irregular, indefinite and often arbitrary and excessive burdens imposed by city councils upon small classes of persons which constitutes the abutting proprietor's grievance and calls for judicious legislative regulation. The power to tax is too dangerous a power to be intrusted to local boards and councils without any careful limitations which, we are persuaded, rarely encompass the powers of municipal bodies. It is no answer to these views to say that the boards and councils are elected by the people as are the legislators, and that the will of the people, expressed through the minor assembly, is entitled to as much regard as that expressed through the legislature itself. Apart from the stereotyped clamor against "ring rule," etc., it is matter of common knowledge that, under our system of submitting propositions directly to popular vote, expenditures are often authorized and liabilities incurred by sheer force of numbers, in direct opposition to the real judgment of the community, and especially of those who will have to pay the money and bear the burden. Of course, as we have already intimated, these practices are too fully established for us to do more than protest against their abuses and to insist that greater caution should be exercised in delegating taxing powers to municipal corporations and other like bodies.

The defense of the assessment system on the ground that he whose property is enhanced in value by a public improvement should be compelled to pay for it, though plausible, is fallacious. To say to a man, "The improvement contemplated by the city will greatly enhance the value of your property, therefore you, besides paying your regular taxes, must pay for it," is very much like forcing a man to volunteer. Why should a man be required to help pay for a public improvement which the interest of the city requires because it increases the value of his property? He pays in this manner for nothing else which enhances the value of his property. If a rich man builds a fine house on a particular street and thereby renders the neighborhood fashionable, and the adjoining lot is doubled in market value, does its owner assess himself for the benefit conferred and pay over his assessment to the millionaire? On the contrary, he quietly enjoys his windfall and prays for the rich man and for more like him.

NOTES OF RECENT DECISIONS.

BOYCOTTING—INTIMIDATION—INJUNCTION.—In the recent case of Sherry v. Perkins[1] the Supreme Judicial Court of Massachusetts considered the question whether a party injured or threatened by the practice of boycotting could obtain redress or protection by

[1] 17 N. E. Rep. 307.

means of the process peculiar to courts of equity. The facts were that the defendants, seeking to injure the plaintiff in his business, endeavored to induce his employees to leave his service and to prevent others from accepting employment from him. To this end they caused a threatening banner to be carried to and fro in front of the plaintiff's business premises, and by this and other means sought to prevent his employees from continuing in his service and all others from engaging with him. He applied to the proper court to obtain an injunction to prevent the displaying of the obnoxious banner, as well as the use of the other injurious means which they practiced against him. The question whether the writ of injunction was properly applicable in such a case came before the supreme judicial court upon exceptions, which the court overruled, saying:

"The case finds that the defendants entered, with others, into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiff from continuing in such employment, and to prevent others from entering into such employment; that the banners, with their inscriptions, were used by the defendants as part of the scheme, and that the plaintiff was thereby injured in his business and property. The act of displaying banners with devices, as a means of threats and intimidation, to prevent persons from entering into or continuing in the employment of the plaintiff, was injurious to the plaintiff, and illegal at common law and by statute.[2] We think that the plaintiff is not restricted to his remedy by action at law, but is entitled to relief by injunction. The acts and the injury were continuous. The banners were used more than three months before the filing of the plaintiff's bill, and continued to be used at the time of the hearing. The injury was to the plaintiff's business, and adequate remedy could not be given by damages in a suit at law. The wrong is not, as argued by the defendants' counsel, a libel upon the plaintiff's business. It is not found that the inscriptions upon the banners were false, nor do they appear to have been in disparagement of the plaintiff's business. The scheme, in pursuance of which the banners were displayed and maintained was to injure the plaintiff's business, not by defaming it to the public, but by intimidating workmen, so as to deter them from keeping or making engagements with the plaintiff. The banner was a standing menace to all who were or wished to be in the employment of the plaintiff, to deter them from entering the plaintiff's premises. Maintaining it was a continuous, unlawful act, injurious to the plaintiff's business and property, and was a nuisance, such as a court of equity will grant relief against.[3] Diatite Co. v. Manufacturing Co.[4] was a case of defamation only. Some of the language in Spinning Co. v. Riley has been criticised, but the decision has not been overruled."[5]

[2] Pub. Stat., ch. 74, § 2; Walker v. Cronin, 107 Mass. 555.

[3] Gilbert v. Mickle, 4 Sandf. Ch. 357; Spinning Co. v. Riley, L. R. 6 Eq. 551.

[4] 114 Mass. 69.

[5] See Assurance Co. v. Knott, L. R. 10 Ch. 142; Saxby v, Easterbrook, 3 C. P. Div. 339; Loog v. Bean, 26 Ch. Div. 306; Food Co. v. Massam, 14 Ch. Div. 763; Thomas v. Williams, *Id.* 864; Hill v. Davies, 21 Ch. Div. 778; Day v. Brownrigg, 10 Ch. Div. 294; Gaskin v. Balls, 13 Ch. Div. 324.

RAILROAD LAW—SOME NOVEL DECISIONS.

A review of the reported cases decided during the past year shows a large number of new and novel questions which have engaged the attention of the courts. In no department of the law and under no title of the reports are there any of more interest than those which fall under the titles "common carriers" and "railroads." And the following will be found to be among the most interesting of that group.

Powers and Regulation of Railroads.—The following laws affecting railroads have been decided by the courts to be unconstitutional, viz.: a Massachusetts law fixing the rates of to be charged by a railroad not only in the State but outside;[1] a Minnesota statute requiring every railroad in the State to permit any person applying to construct and operate grain elevators on its line and land;[2] an Arkansas statute providing that lands donated to railroads shall not be listed or subject to taxation until conveyed to actual purchas-

[1] Com. v. R. Co., 3 N. Eng. Rep. 449.

[2] State v. R. Co., 31 N. W. Rep. 365.

ers;[3] a Georgia statute requiring a street railroad which had built its road under a city ordinance which made it its duty to keep in repair the street between its tracks—to pave the street both between its tracks and three feet on each side.[4]

In 1867, the Omaha Horse Railway Co. was given by a charter the exclusive right for fifty years to operate a "horse railroad" in the city of Omaha. In 1884, the Cable Tramway Co. was organized and given the right by the city to lay and operate a cable road in the streets. The old company asked an injunction to restrain the cable company, contending that its exclusive grant covered a cable railroad or any kind of a street railroad. But the federal court refuses the injunction, holding *first* that construing the monopoly as all grants of monopolies should be construed, strictly, "horse railroad,, does not mean "street railroad," and *second*, that in any event, an exclusive grant of a right to do anything includes only the right to do it as it was done when the grant was made, and not after discovered methods of doing it. Hence, cable roads being unknown when the grant was made, were not included in it.[5]

A railroad, by its charter, was required to establish and maintain a depot within a certain town, and by a contract with the town to stop all its trains at that depot. The company established a depot at a certain place, but after some years, it built a depot in another portion of the town, and the trains no longer stopped at the old depot. The supreme court awards a *mandamus* against the company, holding that while the company has a large discretion in locating its road, yet when it has once exercised that discretion, and erected its depot in the town, these questions are irrevocably settled, and it cannot thereafter abandon its road, or any part of it, without rendering its franchise liable to forfeiture. The court therefore orders the railroad to stop all its passenger trains at the old depot.[6]

A company chartered to build a "railroad" merely has the right to elevate it above the surface wherever the character of the country makes it either essential or convenient, although the word "elevated" may not occur in the charter, or the right to elevate it may not be expressly granted.[7]

The Standard Oil Co. threatened to store its oil until it could lay a line of pipes to Marietta, unless the receiver of a railroad company should give it a special oil rate and agree to carry its oil at 10 cents per barrel, to charge rival shipers 35 cents per barrel, and to pay 25 cents per barrel, of the sum collected from rival shippers to the Standard Oil Co. The receiver, before acceding to this, submitted it to his lawyer in New York, who advised him to go ahead and make the agreement, as it would be to the interest of the road to have the immense business of the Standard Oil Co. at any price. Thereupon the receiver consented. But one Rice, who had a small refinery at Marietta, and who was one of the competitors appealed to federal court for relief, and that tribunal removes the receiver, and orders the receiver to pay to Rice, and the Standard Oil Co. to pay back to the receiver the monies respectively obtained under the illegal agreement.[8]

Carriers of Passengers and Goods.—A station agent had left an acquaintance, not an employee of the road in charge of the office for a short time during which a dispute arose between him and a passenger purchasing a ticket, the former in the course of the altercation assaulting the latter. The railroad was held responsible for the assault.[9]

Railroads being required by statute to post at their stations notices of all cattle killed by their trains, one who had lost a cow went upon the platform of the station to read a notice posted there, taking plaintiff with him to do the reading, as he himself was unable to read. Plaintiff, in climbing up the platform to read the notice, fell through a defective plank and was injured. It was held that he was in the position of a passenger and entitled to damages for the injury.[10]

If a conductor refuse to pass a child on half-fare because he believes it to be over the limited age, and the mother also leaves the train, she may recover damages, if the refusal be wrongful, although the conductor offered to pass her upon her own ticket without

[3] Files v. State, 3 S. W. Rep. 817.
[4] Coast Line R. Co. v. Savannah, 30 Fed. Rep. 647.
[5] Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. Rep. 324 (Neb.).
[6] People v. R. Co., 8 West. Rep. 347 (Ill.).
[7] Bulton v. R. Co., 4 S. W. Rep. 332 (Ky.).
[8] Handy v. R. Co., 31 Fed. Rep. 689.
[9] Finck v. R. Co., 32 N. W. Rep. 527 (Wis.).
[10] St. Louis, etc. R. Co. v. Fairburn, 4 S. W. Rep. 49 (Ark.).

the child. It is unreasonable in such a case to ask a mother to leave her child.[11]

A person and his wife conveyed to a railroad certain land for the purposes of its road, and in consideration thereof the railroad agreed to carry them and their children free of charge on its passenger cars. One of the children subsequently went on a train and was ejected for non-payment of fare. The supreme court court held that he is entitled to damages, saying: "The fact that his *father* had purchased and paid for this right of free carriage is of no importance. The plaintiff's right is as complete as if he had purchased and paid for it himself; and, as a logical consequence, its infringement, whether tortious or otherwise, is a wrong to him for which he has his action. The contract was not that plaintiff should be furnished with a pass upon application, but that he should be 'carried free of charge.' As a reasonable regulation of its business for the purpose of preventing imposition, the defendant might very properly have provided plaintiff with a pass, and required him to exhibit it to conductors. But plaintiff was under no obligation to apply for one; and, if none was furnished him, he had the right to be carried without one. If the defendant, as appears in this case, made it a rule to issue no passes, then it was its duty to inform the conductor of plaintiff's right, and instruct them to allow them."[12]

A and B got on the train together, and when the conductor came to A for his fare he referred him to B. B paid one fare to the destination of both of them and requested the conductor to let him go through the cars and look for a friend who would give him money enough for the other fare. B apparently did not find him; the conductor became afraid of losing the fare and at the next station ejected A for non-payment of fare. B afterwards returned to the car and tendered his own fare, claiming that what he had paid the first time was for A's fare and not his own. The conductor would not receive it. The supreme court held that the conductor had a right to regard the money received from B as for his own fare and therefore A was rightly ejected.[13]

[11] Gibson v. R. Co., 30 Fed. Rep. 374 (Tenn.).
[12] Grimes v. R. Co., 33 N. W. Rep. 33 (Minn.).
[13] Shular v. R. Co., 2 S. W. Rep. 310 (Mo.).

A passenger injured by the falling of a porcelain lamp-shade from the ceiling of the car was held entitled to recover damages,[14] but another passenger who was hurt by the falling of a metal clothes wringer from the rack over his head where it had been placed by the occupant of the next seat was held to have no cause of action against the carrier.[15]

An elderly woman getting off a car was hurt, and the trial court instructed the jury that the conductor being at hand should have helped her, and his not doing so was an act of neglect. This the supreme court on appeal says is wrong. "I do not understand," says one of the supreme court judges, "that there is any *legal* duty resting upon the conductor to assist passengers in leaving the cars."[16]

A railroad is not obliged to stop a train between stations to recover a hand bag which a passenger in attempting to lower the sash dropped out of the window. The passenger in this case was a woman on a train in Louisiana, and the bag contained nearly $6.000 in bank bills, and jewelry worth over $4,000. She told the conductor as soon as it fell out of the window its great value and asked him to stop the train and let her off. He refused, and when they arrived at the next stopping place she at once sent in search of it, but it was never recovered. She therefore sued the railroad, but the Supreme Court of the United States refused a recovery.[17]

A passenger, on a conductor demanding his ticket, searched for and failed to find it, but informed him that he had one and requested him to wait until he found it. The conductor refused and immediately stopped the train and ejected him between two stations. Afterwards the plaintiff found his ticket in the lining of his coat. The supreme court held that a verdict against the company for $500 damages was not to much; that the conductor was bound to wait a reasonable time for him to produce his ticket; and the question, what is a reasonable time, is one of fact to be found by the jury.[18]

In Michigan, it is held that where a passenger who has purchased a ticket of the au-

[14] White v. R. Co., 4 N. Eng. Rep. 267 (Mass.).
[15] Morris v. R. Co., 9 Cent. Rep. 288 (N. Y.).
[16] Simms v. R. Co., 3 S. E. Rep. 301 (S. Car.).
[17] Henderson v. R. Co., 8 S. C. Rep. 60.
[18] International, etc. R. Co. v. Wilkes, 5 S. W. Rep. 491.

thorized agent of a railroad company, believing in good faith that it is genuine, and issued by the company, and such as the agent had a right to sell, states such facts to the conductor of the train, he is bound to take such facts as true until the contrary is proven, without regard to any words, figures, or other marks on the ticket, and where, upon the passenger refusing to pay fare, the conductor lays hands upon him with the purpose of removing him from the train, the conductor is guilty of assault and battery, for which the company is liable in damages. This ruling conflicts with a number of previous decisions, which hold that the conductor has a right to enforce the terms of the ticket, and to disregard the passenger's explanations.[19]

When a passenger goes on a train of a railroad company and pays his fare to be transported to some locality on such company's road, and the conductor, before the journey is completed, tells the passenger that the train will not go to the station to which such passenger has paid to be carried, and that he can either get off at the station where the train is then stopping, or go to some other point, whereupon the passenger leaves the train, he has a right of action against the company for damages. But the passenger may waive his rights. And a person in Florida has just done this very thing. After he left the train the conductor offered him back the fare for the uncompleted part of the journey. He innocently accepted the money. The Supreme Court of Florida ruled that he waived his rights by doing so, and could recover nothing.[20]

It was the custom at a certain station for the train to run past the platform and then back down on another track before it stopped. This was done in order to pass a train due at that time in the opposite direction. A passonger not knowing that the train would come back jumped to the platform and was badly hurt. The jury gave him $10,000 damages. This, however, the supreme court reversed, saying: "There is no general rule of law which requires a railroad company to stop any of its trains, when it *first* reaches the depot or depot platform, at a station at which passengers are to leave the train. If it be a passenger or mixed train, the company must, ordinarily, stop the train, and allow passengers to disembark on the depot platform; but it may run its trains by the platform, in the first instance, if that is required by the exigencies of its business, and afterwards return the same thereto. But, if the company carry passengers upon its freight trains, we are aware of no rule of law which makes it the duty of the company to give such passengers an opportunity to disembark on the depot platform.[21]

A passenger entered a car, having in a pocket of his overcoat a sum of money, and gave the overcoat to the porter without mentioning the money, and the porter hung the coat in the passenger's berth. He was taking the money to give to his brother to invest, and he had on his person sufficient other money for his traveling expenses. The supreme court decides that the money was in his own custody and at his risk.[22]

A passenger entered a regular passenger train at Chicago to be carried to his home. When the train reached certain ore docks belonging to to the Joliet Steel Co., it was stopped in the midst of a mob of striking workmen, theretofore employed by the steel company, who had "gone out on a strike," and took on board quite a number of non-union men, or "scabs," as they were termed by the strikers, and at the next railroad crossing, the train was captured by a portion of the strikers, who had congregated there for the purpose, and broke into the car wherein the plaintiff was riding, and commenced beating the non-union men, and firing pistols in and around the car. The plaintiff received a bullet in the groin. The court held the railroad liable in damages.[23]

A railroad company failed to promptly deliver a still-worm transported by it, which was to be used in the manufacture of turpentine. Pending the delay, the still had to lie idle, and the tree-boxes from which the crude gum was gathered ran over for want of barrels in which to deposit it, and much of the gum was wasted. The supreme court holds that the shipper is entitled to recover for the

[19] Hufford v. R. Co., 31 N. W. Rep. 544 (Mich.).
[20] Florida, etc. R. Co. v. Katz, 1 South. Rep. 472.
[21] Hemmingway v. R. Co., 31 N. W. Rep. 260.
[22] Hill v. R. Co., 33 N. W. Rep. 643.
[23] Chicago, etc. R. Co. v. Pillsbury, 11 West. Rep. 757 (Ill.),

loss of the gum and likewise his expense in trying to find the still-worm.[24]

An Iowa statute prohibits common carriers from receiving for transportation intoxicating liquors. The plaintiff, the manufacturer of a beverage which he claimed was non-intoxicating' and which he called "New Era Beer," applied for a *mandamus* to compel a railroad to transport this commodity for him. The supreme court refuses the writ on the ground that, as "beer" is one of the liquors which the prohibition law especially concerns, the defendant had a right to refuse anything called beer, and was not compelled to analyze it to find out whether it was intoxicating or not *i. e.*, whether he could safely carry it or not.[25]

An agent for soliciting orders, his employers in Philadelphia, the plaintiffs, reserving the right of rejection, sent in an order from L. Behrend at Washington. Plaintiffs, knowing no such person, but supposing A. Behrend, who had bought before, was intended, delivered the goods marked "A. Behrend" to a railroad company to transport from Philadelphia to Washington. When they arrived L. Behrend claimed them. A. Behrend, although still in Washington, was out of business. After ascertaining from the agent what kind of goods he had sold L. Behrend the defendant delivered the goods to L. Behrend. The supreme court decides that upon his insolvency and failure to pay for the goods, the railroad was liable to the plaintiffs for their value.[26]

Agent and Employees.— A street railroad company posted in its waiting room the following notice: "H. B. McCurdy has been discharged for failing to ring up all fares collected. Discharged employees are not allowed to ride on employee's tickets. C. P. Sorg, assistant superintendent." McCurdy sued the company for libel, but the supreme court decides that the words do not constitute a libel. The court says: "The company had a clear right to insist upon the full performance of his duty; it was for many reasons, perhaps, important that it should be faithfully and promptly performed; and the company, apart from any anticipated fraud, might well annex the penalty of a dismissal from service for neglect of this duty. But a failure to perform the duty required might result from mere neglect or inefficiency, or from motives of dishonesty. Failure to ring up all the fares collected, therefore, does not necessarily imply the fraud or dishonesty of the conductor; it does not import the commission of any crime. Embezzlement is the fraudulent application by one of the money intrusted to his care by another; and even if McCurdy did fail to ring up all the fares collected, *non constat* that he embezzled the money."[27]

A brakeman had signed the following document on entering the service of the railroad: "Clinton Eubanks, having been employed, at his request, by the Little Rock & Fort Smith Railway in the capacity of brakeman hereby agrees with said railway, in consideration of such employment, that he will take upon himself all risks incident to his position on the road, and will in no case hold the company liable for any injury or damages he may sustain, in his person or otherwise, by accident or collisions on the trains or road, or which may result from defective machinery, or carelessness or misconduct of himself or any other employee and servant of the company." He was afterwards killed by the train being thrown from the track by a defective switch, and his executors sued the company. The court held that the agreement was not binding.[28]

An employee was at work on a flat car on a side track. A line of telegraph poles of the usual height, which supported wires crossing the track to the depot, stood along the company's right of way, where they had been maintained substantially in the same position since 1874, one of the wires being used by the railway company, the other in the business of the telegraph company. A freight train approached the station over the main track, and on the top of one of the cars somewhat above the ordinary height stood a brakeman, six feet, three and a half inches in height, whose head came in contact with one of the wires, which crossed the

[24] Savannah, etc. R. Co. v. Pritchard, 1 S. E. Rep. 261 (Ga.).
[25] Milwaukee Malt Extract Co. v. R. Co., 34 N. W. Rep. 701.
[26] Wermbag v. R. Co., 9 Cent. Rep. 603 (Penn.).
[27] Pitts., etc. R. Co. v. McCurdy, 6 Cent. Rep. 721 (Penn.).
[28] Little Rock, etc. R. Co. v. Eubanks, 3 S. W. Rep. 810 (Ark.).

track. The blow broke the insulator of the telegraph pole, causing the wire to become detached and fall down on the top of a moving car, catching a brake-handle which carried it forward with the moving train, the wires coiling about the body of the decedent as he stood on the flat car, dragging him from the car, inflicting injuries resulting in instant death. The supreme court reverses a verdict against the railroad, holding that the facts showed no negligence on its part.[29]

A car repairer, while under a car, was killed by another car being backed against it. Some roads, it seems, have a rule to this effect: That a blue flag or light on the end of a car means that men are working under it, and it must not be moved. The defendant had no such rule, and on this ground the court holds it negligent and liable for the death of the car repairer.[30]

It is negligence in the company to leave the spaces between the ties of a track unfilled whereby a brakeman engaged in coupling cars at night stumbles and is injured.[31]

Other Injuries.—Fire from a passing locomotive set fire to a fence around a cornfield at the side of the track. The fence was burned down in places, through which cattle from the adjoining fields came in and destroyed the corn. The railroad was held liable for the corn.[32]

If a railroad car is left at a crossing so near the traveled part of the highway that a wagon cannot pass without the wheels or whiffletrees coming in contact with the bumpers it is an obstruction of the highway, and if it so obstructs the highway for a longer time than the statute allows, and frightens a horse attached to a wagon, which runs away and injures the driver, the company is liable in damages, provided the driver used due care and the accident was not due to the vice of the horse.[33]

A boy of eleven, on his way home from school, was attracted to an excursion train by the playing of a band on the train, and went to and entered one of the cars where the band was playing. No objection was made, at the time, to his going into the car. Some other boys were on the car with him. The train moved off to reach a point where a crowd of passengers were waiting to get aboard. While the train was thus moving, a man having a lantern in one hand and a stick in the other, came through the car, and ordered this boy and the other boys to get off, hurrying them, and, as some of the witnesses said, striking at them with the stick in his hand. At any rate, in the effort to get off while the train was running, the boy fell between the cars and was injured so that he afterwards died from the effect of such injury. The supreme court holds the railroad responsible in damages.[34]

The employees of a railroad placed some signal torpedoes on the track near a depot and at a place used as a crossing. They intended to explode them, but went away without doing so. Immediately after the train had moved on, a small boy, about nine years old, who, with the knowledge of the railroad employees, was coming on the track immediately behind the train, discovered the torpedo, picked it up, and exhibited it to the plaintiff, a boy ten years old, and several other boys of about the same age, all of whom were ignorant of its dangerous or explosive character. While it was being so exhibited near where found, it exploded, without plaintiff's fault, with such force that it killed one boy, destroyed an eye of each of two other, and tore off plaintiff's left hand and arm, and otherwise injured him. The supreme court holds the railroad liable for the injury.[35]

A man walking on a path near the track and on the right of way of the railroad was injured by being hit by a cow, which, being on the track, was struck by the train and thrown in the air. The supreme court holds the road liable.[36]

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[29] Wabash, etc. R. Co. v. Locke, 11 West. Rep. 877.
[30] Abel v. R. Co., 5 Cent. Rep. 615 (N. Y.).
[31] Gulf, etc. R. Co. v. Rediker, 2 S. W. Rep. 527 (Tex.).
[32] Miller v. R. Co., 2 S. W. Rep. 439 (Mo.).
[33] Peterson v. R. Co., 31 N. W. Rep. 548 (Mich.).
[34] Vicksburg, etc. R. Co. v. Phillips, 2 South. Rep. 537 (La.).
[35] Harriman v. R. Co., 9 West. Rep. 438 (Ohio).
[36] Ulehama, etc. R. Co. v. Chapman, 2 South Rep. 738.

TRUSTS—POWER OF CESTUI QUE TRUST TO INCUMBER ESTATE—CASE STATED.

WEAVER V. VAN AKIN.

Supreme Court of Michigan, June 22, 1888.

1. *Trusts—Power of Cestui Que Trust to Incumber Estate.*—Under the Michigan statutes, both the legal and equitable title of an estate conveyed in trust vests in the trustee, and the *cestui que trust* takes no interest in the estate, but may enforce the trust. Accordingly the *cestui que trust* cannot dispose of or charge the trust estate with anything; nor can the trustee do so, except as expressly authorized by statute.

2. *Same—Case Stated.*—A testatrix devised an estate in trust for the benefit of two nieces, who were mother and daughter. The daughter executed a conveyance of her interest to her mother. While the trust was still unexecuted, upon the representation of the trustee that it was necessary to raise money to pay off the claims of heirs, the mother executed a mortgage of the estate, which was assented to and signed as witnesses by the trustee and daughter. Afterwards the mother conveyed the estate to the daughter, who assumed and agreed to pay the mortgage debt. In an action by an assignee thereof to foreclose the mortgage, it was held that the act of the trustee was void, not having been done to carry into effect any of the purposes of the trust; that the mortgage was void as to the mother and daughter, since they had no power to convey the trust estate, and that the promise of the daughter could not give it validity.

SHERWOOD, C. J., delivered the opinion of the court:

The bill of complaint in this case is filed to obtain a decree to declare a mortgage made by defendant Caroline Weaver, wife of the complainant, to Elihu L. Clark, to be in effect a mortgage made by all the defendants, and to foreclose it as such, and to make all the defendants liable for any deficiency that may arise after a sale of the mortgaged premises to pay the mortgage debt. The property was originally owned by Paulina Fish, and known as the "Hudson Farm." Before she died, she devised and bequeathed all of her estate to the defendant Edwin Hadley, in trust for the following purposes: "(1) To pay debts and funeral expenses; (2) to attend to and manage the affairs and interests of the estate during the trusteeship; (3) to receive and apply, during his trusteeship, the rents and profits of the Hudson farm, or so much thereof as should be required for that purpose, to the support of her sister, Betsey A. Vining; (4) to raise and advance, from any part of the estate, the necessary sums to relieve the wants and necessities of Caroline Hertzler and Phœbe Fish (nieces of the testatrix), and to invest any balance remaining until said Phœbe (who is the daughter of said Caroline) should become of age; (5) and when said Phœbe should become twenty-one, and after the discharge of such just dues as should then be against the estate, to convey all, with said Hudson farm, to said Caroline and Phœbe, in equal shares." Upon the death of the testatrix, in 1872, the will was probated, and the administration of the estate was committed to said Hadley, who entered at once upon the execution of his trusts as such administrator, and as trustee under the will; but no debts were ever proved against the estate of said Paulina, nor is it known that there were any. That after probate of the will, and prior to the time when said Phœbe became of age, said Hadley paid a considerable amount out of the estate to said Phœbe and Caroline, and also paid a considerable amount of the rents received by him from said farm to said Betsey A. during her life-time. That said Hadley never settled said estate in the probate court, nor did he ever report to said court any of his proceedings in the administration of the estate. That he has never rendered any account, as trustee under said will, to any one, nor has he made any settlement of said trusts, but the same remain open and unsettled; and that he has never conveyed the legal title to said farm to said Caroline and Phœbe, or either of them, or to any other person. May 11, 1875, said Phœbe, while yet a minor, but in contemplation of marriage, made a voluntary conveyance of her interest in said Hudson farm to said Caroline, her mother. October, 1875, Phœbe attained her majority. November 24, 1875, Hadley represented to Caroline and Phœbe that it was necessary to raise $2,250 by mortgage upon said farm, to pay off the claims of certain heirs upon the land; and they, believing such loan and mortgage to be necessary for that purpose, consented thereto. Said Hadley then borrowed the money of one Clark, to be secured by Caroline's mortgage on the farm, upon his representation to Clark that, by said will and the deed from Phœbe, the said Caroline was then the sole owner of the premises; and thereupon, for the purpose of securing said loan, the said Caroline, on the 24th day of November, 1875, by the procurement of said Hadley, and with the full knowledge and concurrence of said Phœbe, gave her note and a mortgage for $2,250 upon said farm to said Clark, the execution of which mortgage by said Caroline was in the presence of said Phœbe and said Hadley, who were the subscribing witnesses thereto, and the same was delivered by Hadley to Clark. February 2, 1877, Caroline reconveyed to Phœbe, by quitclaim deed, the undivided half of the farm previously conveyed by Phœbe to her. February 3, 1877, Caroline sold and conveyed her own undivided half of the farm to said Phœbe, subject to said mortgage to Clark, which mortgage the said Phœbe, in the agreement of purchase and in and by the deed of conveyance to her, assumed and agreed to pay. December, 1879, the said mortgage being wholly unpaid, a foreclosure thereof by advertisement was commenced by Clark. March 13, 1880, the farm was purchased by and conveyed to said Clark, upon the foreclosure sale, for $3,409.71. April 29, 1880, Clark died; and by his will, which was duly proved, his interest in said mortgaged premises, and in said note and mortgage, were vested in his widow, Isabella T. Clark. That the farm was

never redeemed from said sale, nor has said mortgage ever been paid or discharged, except through said foreclosure. That complainant has purchased, and by quitclaim deeds of May 3 and November 9, 1881, has received a conveyance, from Mrs. Clark, of all the interest acquired by her husband, Clark, under the said mortgage in said farm. That said Phœbe has been in possession of the whole of said premises ever since the execution to her of said deed of Febuary 3, 1877, and still keeps and retains the same, and refuses to pay the said debt secured by said mortgage to said Clark. And, because of her infancy at the time of the execution of her deed of May 11, 1875, denies that it conveyed any interest in said farm to said Caroline; denies that the mortgage to Clark covered any more than Caroline's half of the farm; and denies that complainant has acquired any title to said farm by virtue of said deeds from Mrs. Isabella T. Clark, or any interest in said mortgage, or the debt secured thereby. The theory of the case set up in the bill is that the will of Paulina Fish vested in Hadley an absolute legal title in fee simple to the Hudson farm, and at the same time vested the equitable title in the nieces, Caroline and Phœbe. That the legal title to the land still remains in Hadley, for the reasons: (1) that the trusts of the will have not been closed; (2) that the legal estate has never passed from him in the manner provided by the will—that is, by a deed of conveyance; (3) that the legal estate vested in him was such that it could be divested by him only by a conveyance in writing. That Phœbe's deed of May 11, 1875, conveyed her equitable interest in the farm to Caroline. That, when Caroline executed the mortgage to Clark, she held the equitable title to the whole, while the legal title to the land remained vested in Hadley; hence, as to her, it was an equitable mortgage merely. That it was an equitable mortgage on the part of Hadley, because he assented to it, procured it to be executed, delivered it, represented to Clark that Caroline was the owner of the land, and had the right to make it, procured the loan of money upon it, and intended it as a security for the loan. That, if Phœbe then had any interest in the farm, it was an equitable mortgage on her part, because she assented to it, and assisted in its execution by witnessing it, and thereby held out to Clark that Caroline was the owner of the farm, and had the right to mortgage it. That this being an equitable mortgage merely, it could be foreclosed only in chancery, and Clark's attempted foreclosure at law was ineffectual to bar the equity of redemption; but his statutory foreclosure and purchase at the sale, and the subsequent deed of the farm to complainant, operated as an assignment of the debt and equitable mortgage to him, with all of Clark's rights to foreclose the same, and that he has a right to bring this bill for that purpose. Such are the material averments of the bill, and the theory upon which complainant relies for relief. The defendant Phœbe Van Akin interposed a general demurrer. The other defendants did not appear. On the hearing at the circuit, Judge Watts sustained the demurrer, and dismissed complainant's bill.

It is the contention of the complainant that, at the time of the execution of the mortgage, Hadley had the legal title to the premises, and that the equitable title was in the mortgagor, Caroline, or in her and Phœbe; and it is further contended by complainant that Hadley having negotiated the loan and procured the execution of the mortgage, and represented to Clark, the mortgagee, that Caroline held the entire title, she is estopped from denying its validity; and that Phœbe, having assented to the making of said loan and mortgage, and having subscribed the mortgage as a witness, is also estopped from denying its validity; and that Phœbe and Caroline should in this suit be held as joint makers of the mortgage. We do not think this position can be maintained. They were the *cestuis que trustent;* and, as such, they, nor either of them, had any title, either legal or equitable. The whole estate, both legal and equitable, is vested in the trustee, under our statute. The person for whose benefit the trust is created, takes no estate or interest in the land, but may enforce the trust. How. St. § 5578; Noyes v. Blakeman, 6 N. Y. 567. The *cestui que trust* possesses no power, and has no right, to charge the trust property with anything. Neither can the trustee himself do so, unless expressly authorized by the statute, and then the charges must be strictly confined to the objects for which the authority was given. L'Amoureux v. Van Rensselaer, 1 Barb. Ch. 34. This mortgage was not made to carry into effect any of the purposes of the trusts contained in the will, nor is there any fraud charged in the bill against Caroline or Phœbe; neither is there any claim that either of them received any benefit from the loan for which the mortgage was given; and Hadley's act, in giving the mortgage, was absolutely void by the terms of the statute, under the circumstances. See How. St. § 5583. It therefore appears that neither of the defendants had any power, under the will, to make the mortgage. Hadley certainly had none, and the only interest Caroline and Phœbe had was the right to enforce the trust; and this they could not assign, dispose of, or incumber. Noyes v. Blakeman, *supra;* Learned v. Tallmadge, 26 Barb. 443; Gott v. Cook, 7 Paige, 521. At the time this mortgage was made, the trust had not been fully executed, and the legal title, therefore, remained in the trustee, as did the equitable, under the statute. It is only when a party has a title, legal or equitable, in fact or of record, that he can give a valid mortgage upon land; and it not being shown that either Caroline or Phœbe had either at the time the mortgage in suit was given, and that the mortgagee and his assignee had such notice as the law requires of the actual situation of the title at the time, and of the fact that the trust of Hadley was not yet executed, it is difficult to see how the complainant can maintain his bill, or how,

under all the circumstances, Phœbe can be estopped from making the defense she now interposes. The mortgage given by Caroline being void, no promise to pay it by Phœbe can give it validity. Neither can it create an equity in favor of the mortgagee or his assignee, requiring her to pay it. The complainant's whole theory is based upon the assumption that Caroline and Phœbe had the equitable title and interest in the property; and, such not being the case, the argument of the learned counsel for complainant, based thereon, necessarily fails. It is quite manifest that Phœbe cannot be held to have ratified the deed of another, of lands, which she herself could not nave made, by signing such deed as a witness, even though she consented to the making of the same; and her assumption of the payment of such mortgage in the deed she received from Caroline subsequently could not bind her if such deed were void. And this is the most she did, upon which the estoppel is claimed. There is no view which we have been able to take of the case that will sustain the complainant's bill. The decree sustaining the demurrer must be affirmed, with costs.

NOTE.—In the absence of any statutory prohibition, where the equitable title of property conveyed in trust vests in the *cestui que trust*, he may incumber or charge such equitable interest in any manner not inconsistent with the trust and which is authorized by the instrument or conveyance creating the trust.[1] But where the whole estate, legal and equitable, vests in the trustee, under statutes similar to the one cited in the principal case, the *cestui que trust* can create no charge against the trust property.[2] So, it has been held that where an estate is conveyed in trust, to pay the income thereof to a certain person, he can create no charge against the income or any part thereof in advance of its becoming due.[3]

In New York, under a deed of trust reciting that the rents and profits of an estate shall be received by a trustee to pay all expenses, etc., and the residue to the *cestui que trust* upon her separate order, the *cestui que trust* cannot "assign, dispose of, or in any manner mortgage or pledge her interest in the trust property, or in the future income thereof; nor could she contract any debt which would create a lien upon such future income, so as to authorize the creditor to reach such income by any proceeding, either at law or in equity."[4]

In Noyes v. Blakeman,[5] a wife and husband had united in a conveyance of land, the fee of which was in the wife, to a trustee. It was provided that the income arising from the trust estate should be applied, so far as necessary, to the payment of taxes and other necessary expenses, and that the remainder should be paid to the wife on her separate receipt; and it was further provided that she should have the power to apply and dispose of the income and lands by will, and to appoint a new trustee or trustees as often as a vacancy should occur. It was held that the wife, under the statute, had no estate or interest in the lands or in their future income upon which she could create a lien or charge for the expenses of protecting the trust estate or for any other purpose.

As stated in the principal case, it has been held that a trustee cannot create a charge against the trust estate, except as specially authorized by statute or the provisions of the instrument creating the trust.[6] But the better opinion would seem to be that, in the absence of a statutory prohibition, the trustee may charge the estate with the expenses necessary for its protection, when there are no funds in his hands, although such a power is not specified in the instrument creating the trust.

In such a case, already cited,[7] it was said: "If he (the trustee) had advanced his own means or given his personal liability, he would clearly have had a lien upon the incoming rents and profits for the purpose of reimbursing or indemnifying himself; * * * and there is no rule of law or equity within my knowledge which would prevent his assigning that lien, if necessary, for the protection of his *cestui que trust*. The deed, it is true, does not, in terms, contemplate any other appropriation of the rents and profits than for the objects specified. But what then? Shall the trustee stand quietly by and see the objects of the trust utterly frustrated? It would be a reproach with which the law is not to be made chargeable. Rather than suffer it, the law will infuse into the trust deed a provision to enable the trustee to exercise the necessary power, if possible, to prevent it.

"It is undoubtedly true, as a general rule, that where a trustee employs agents in the execution of his trust, they are to look to him individually, and have no lien upon the trust fund for their compensation. If he is in funds he is bound to protect the estate, in which case he has no lien, and consequently cannot assign it, having none to assign. But being without funds, and a necessity arising for expenditures in order to protect the estate from spoliation, he may either make them himself and be allowed for them in the passing of his accounts, or may engage others to do it upon the credit of the fund, reserving to himself the same management and direction as in any other case, and thus avoid the objection that he had delegated his trust." CHAS. A. ROBBINS.

[1] L'Amoureux v. Van Rensselaer, 3 Sandf. Ch. (N. Y.) 107; Lincoln, etc. Association v. Hass, 10 Neb. 581; Laughlin v. Bradley, 25 Kan. 147; Tift v. Mayo, 61 Ga. 246; Dibrell v. Carlisle, 51 Miss. 785; Elliott v. Armstrong, 2 Blackf. (Ind.) 198; Martin v. Davis, 82 Ind. 38; Farmers', etc. Bank v. Brewer, 27 Conn. 600; Averett v. Lipscombe, 76 Va. 405.

[2] L'Amoureux v. Van Rensselaer, *supra;* Noyes v. Blakeman, 6 N. Y. 567. See also Bennett v. Garlock, 79 N. Y. 302.

[3] Clute v. Bool, 8 Paige (N. Y.), 83; Van Epps v. Van Epps, 9 *Id.* 237; Graff v. Bonnett, 31 N. Y. 9; Campbell v. Foster, 35 N. Y. 361. *Contra:* Farmers', etc. Bank v. Brewer, 27 Conn. 600; Martin v. Davis, 82 Ind. 38.

[4] L'Amoureux v. Van Rensselaer, 3 Sandf. Ch. 107.

[5] 6 N. Y. 567.

[6] L'Amoureux v. Van Rensselaer, 3 Sand. Ch. 197; Tift v. Mayo, 61 Ga. 246. But see Uylly v. Collins, 9 Ga. 223.

[7] Noyes v. Blakeman, 6 N. Y. 107.

INSURANCE — TONTINE POLICY — EQUITY — ACCOUNTING—TRUST.

UHLMAN V. NEW YORK, ETC. CO.

New York Court of Appeals, June 5, 1888.

Insurance—Tontine Policy—Equity—Accounting—Trust.—Under the tontine plan of life insurance, the relation between the insurer and the insured is that of contract, and not of trustee and *cestui que trust*, and therefore a court of equity cannot order an accounting between the parties upon the general principles of its jurisdiction over matters growing out of trusts.

PECKHAM, J., delivered the opinion of the court:

The plaintiff commenced this action for the purpose of obtaining an accounting from the defendant in regard to matters stated in the complaint. It was therein alleged that on the 29th of December, 1871, the defendant issued to the plaintiff a certain policy of insurance, and that the plaintiff had duly complied with all the conditions of said policy; that it was a policy known as "The Ten-year Dividend System Policy," and that the ten years expired in December, 1881; that all the premiums had been paid by the plaintiff during that time, and the policy was in force at the time of the commencement of this action. The plaintiff then alleged, upon information and belief, that the defendant, during this time, had wrongfully appropriated the surplus and profits, or a large portion thereof, belonging to the plaintiff under the policy and had diverted the same to other purposes than the benefit of the plaintiff, and that it had not kept the fund and its accumulations separate, and that defendant refused, for dishonest and unlawful reasons, to furnish the plaintiff with an account, as demanded. Plaintiff also alleged that defendant became a trustee of the various moneys that were paid to it on account of the policies of the class to which the plaintiff's policy belonged, and that plaintiff, relying upon the terms of said policy and the supposed honesty of the defendant as a trustee of the funds above mentioned, took out the said policy, and paid the premiums required, and assumed the risks and conditions mentioned therein, and that he had in all things duly performed all the conditions of the policy. The plaintiff then prayed judgment that the defendant be compelled to render a true and just account to the plaintiff of the names of the parties insured by it under the system in which the plaintiff had been insured, the amount of each and every policy thus issued, a detailed account of premiums paid into and received by the defendant on account of said policies, the amount of surplus and profits which each of said policies had earned, together with a number of other details in regard to the accumulation and disposition of such fund. Judgment was also demanded that the defendant be compelled to make good and pay all such sums which it had unlawfully misappropriated or expended out of said fund, and that it be compelled to issue to the plaintiff an annuity bond of the amount to which he is entitled, or, at his option, to pay the value in cash to him; and that a receiver of the fund, and all the books and papers connected therewith, be appointed, pending this action, as well as after judgment, if it is deemed advisable and proper. A copy of the policy issued by the defendant to the plaintiff was attached to and formed a part of the complaint, by which it appeared that on the 29th of December, 1871, the defendant insured the life of the plaintiff in the amount of $5,000, for the term of his natural life, commencing at noon on that day; that the policy was issued to and accepted by the assured "(1) on the special agreement and conditions relative to policies on the ten-year dividend system;" and "(2) that the ten-year dividend period would be completed on the 29th of December, 1881; (3) that no dividend should be allowed or paid upon the policy unless the person whose life is assured shall survive until the completion of the ten-year dividend period, and unless the policy shall then be in force; (4) that all surplus or profits derived from such policies, on the ten-year dividend system, as shall cease to be in force before the completion of their respective ten-year dividend periods, shall be apportioned equitably among such policies of the same class as shall complete their ten-year dividend period; and that, previous to the completion of its ten-year dividend period, this policy shall have no surrender value in cash or in a paid-up policy." The defendant answered this complaint, and denied all the allegations of misappropriation or wrong-doing, and alleged the proper and equitable apportionment of the fund, and an offer to to give to the plaintiff what he was entitled to therein, either in cash or in shape of an annuity bond. The issues thus joined came on for trial at a special term, and upon the trial plaintiff abandoned all allegations as to any misappropriation of the fund or any wrong-doing whatever in regard thereto, and based his cause of action upon his right to an accounting from the nature of the transaction, as appearing in the contract evidenced by the policy of insurance issued to him. The plaintiff claimed that, upon the mere proof of the issuing of a policy such as was issued to him, and that it had been kept alive during the ten-year period, and was in full force at the time the dividend was payable, gave him the right to demand from the defendant a full and complete accounting of the debit and credit items of what he terms the "tontine account," with a list of the members entitled to participate therein, and also all the details demanded in his prayer for judgment in the complaint. He maintained that it was unnecessary to prove any of the allegations of misappropriation or improper action, or even any mistake in relation to the principles upon which the apportionment had been made; but that, from the mere nature of the transaction itself, he had the right to maintain an action to compel the defendant to make a full accounting in

regard to all the matters spoken of. The special term substantially held with the plaintiff, and granted an interlocutory judgment, providing for the taking of an account, and for the entry of a judgment thereon for the amount of cash which should be found to be due the plaintiff, or, at his option, an annuity bond for an equal amount. The defendant, under section 1001 of the Code, upon a case made, moved for a new trial at the general term, and, after argument of that motion, the general term granted the new trial, and vacated the judgment above mentioned. From the order granting a new trial the plaintiff has appealed here, giving the usual stipulation in such cases. He claims now to maintain the action, and to have the right to an accounting, upon the ground (1) that the relation between the plaintiff and defendant is not one solely of contract, but that, as to the participation in the profits of this tontine system, that relation is similar to one of trustees and *cestui que trust;* (2) on the ground that the account itself, although there is but one side to it, is of a nature so difficult and complicated that it cannot be properly tried in an action at law, and hence this action is the appropriate remedy. The right to maintain this equitable action, based upon either or both these grounds, will therefore be discussed.

As to the first. We are convinced, after a careful examination of the character of the relations existing between these parties, that it cannot be said that the defendant is in any sense a trustee of any particular fund for the plaintiff, or that it acts, as to him and in relation to any such fund, in a fiduciary capacity. It has been held that the holder of a policy of insurance, even in a mutual company, was in no sense a partner of the corporation which issued the policy, and that the relation between the policy-holder and the company was one of contract, measured by the terms of the policy. See Cohen v. Insurance Co., 50 N. Y. 610; People v. Insurance Co., 78 N. Y. 114. Upon the payment of the premiums by the various policy-holders embraced in the tontine class, the money immediately becomes the property of the company, and no title thereto remains in any of the policy-holders. Under such a policy as this, there is no obligation on the part of the corporation to keep the premiums paid on such policies separate and apart from its other funds. Nor is there any obligation on its part to invest such funds in any particular way, or at any particular time. The contract contemplates the fact that the funds will be invested; but the character of such investment is left absolutely to the discretion of the defendant, except as it may be limited by the laws of the State. This question of separate investment, and what use should be made of the money received on policies of this description, has been discussed in the late case of Bogardus v. Insurance Co., 101 N. Y. 328, 4 N. E. Rep. 522, in an opinion by Ruger, C. J. The policy in that case was substantially identical with the one in question; and what was said by the chief judge in that case upon this subject may be repeated and reaffirmed here. It is true that, in speaking of the rights of the plaintiff in that case (which arose upon a failure of the plaintiff to keep the policy in force during the whole of the tontine period), the chief judge, while holding that the failure to keep the policy in force was fatal to any right of action which the plaintiff might otherwise have had, stated that "the method to be adopted by the defendant in managing the funds paid to it by its several policy-holders was necessarily, under the insurance laws of the estate, confided to its judgment, discretion, and skill, and the plaintiff has no cause of complaint in reference thereto, except in the event of the survivorship of Abraham Bogardus for ten years, and the continued existence of her policy. Upon the happening of such event, and not until then, she would become entitled to an accounting as to such fund." It was clearly not before the court, and the learned judge probably did not have in mind the particular rights as to an accounting, or under what circumstances those rights would exist in case the plaintiff's policy had been continued in force, and the question of those rights had been the question then to be decided. The subject under discussion was as to what, if any, rights the plaintiff in that case had, with the fact existing that the policy which was the foundation of the whole transaction had ceased to exist, and by the terms thereof had become forfeited before the action was commenced. It had ceased to exist because the plaintiff had refused or neglected to pay the premiums as they became due; and the plaintiff gave, as a reason for refusing to pay them, certain facts which it was claimed were sufficient to justify the refusal. This court decided against the plaintiff on that question, and that was the only proposition that was directly decided. Here the question is distinctly up as to what rights the plaintiff had after the expiration of the ten-year period, the policy itself being in force; and, unless there was some relation fiduciary in its nature, the right to an accounting on that ground cannot be claimed. We think the payment of a premium by the policy-holders of this class of policies is much more like that of a deposit in a bank by a depositor, as to which it is conceded that there is no such relation of trustee and *cestui que trust.* See Foley v. Hill, 2 H. L. Cas. 32. By the very terms of this policy, the amount of the fund is necessarily uncertain. What it may be depends, not only upon the number of policies taken out during the period, but upon the number of policies in the class which may lapse or become forfeited, and upon the amount of the proper expenses of the company which shall justly become chargeable to this fund. So that the dividend which may come to the plaintiff, or any other policy-holder, depends upon numerous contingencies; and in relation to all these matters the parties have agreed in specific terms, contained in the policy itself, that this surplus or fund, derived as already stated, "shal

be apportioned equitably among such policies of the same class as shall complete their ten-year dividend period." Here is the extent of the obligation of the defendant—that it shall equitably apportion this sum. As has been said, there is no title in the plaintiff to any specific moneys. There is in reality no specific or separate fnnd, as it is made up simply by a system of debits and credits contained in the books of the company, which debits and credits are made during the running of the tontine period. There is no separation of the fund belonging to this system, and no legal necessity for such separation from any other fund or property belonging to the defendaut. The situation of the parties is that of debtor and creditor simply, the amount of such debt being determinable by this equitable apportionment, which, taking the language of the policy into consideration, necessarily means that the apportionment is to be made by the corporation thrcugh its officers. The case of Marvin v. Brooks, 94 N. Y. 71, has no tendency whatever to uphold the plaintiff's claim. In that case the plaintiff had deposited with the defendant a certain sum of money, upon the trust that defendant would use it in the purchase of certain property in which plaintiff was to have one-half, and the defendant the other half, interest. It was held that the money thus placed in the defendant's hands continued the property of the plaintiff, and was impressed with a trust in the hands of the defendant which entitled the plaintiff to call him to an account as to the disposition of the money, the purchase of the property, its price, etc., and that the burden rested upon the defendant of showing these facts. We have no doubt of the correctness of that decision, and just as little that it is no authority for the plaintiff's contention herein. We do not, however, accede to the claim of the defendant herein, to its full extent, as made in the brief submitted, which is that the apportionment, as made by the defendant, is absolutely and at all events conclusive upon the policy-holders. We hold that, under the terms of this policy, the apportionment was to be equitably made, and in the first instanee by the defendant's officers or agents. But, inasmuch as the agreement is that the apportionment shall be an equitable one, the question of what is an equitable one, all the facts and circumstances being known, may be one over which the courts have supervision. *Prima facie*, the apportionment, as made by the defendant, should be regarded as a compliance with the terms of the policy; or, in other words, should be regarded as an equitable apportionment. It should be thus regarded, because, by the terms of the policy, the duty of making it is cast upon the corporation, and it ought to be presumed that the defendant has performed its duty, instead of presuming that it has failed to do so. But the question is still left, has or has it not complied with its agreement to make an equitable apportionment? And the plaintiff, and all others similarly situated, have the right, upon proper allegations of fact showing that the apportionment made by the defendant is not equitable, or has been based upon erroneous principles, to have a trial, and make proof of such allegations, and, if proved, the court will declare the proper principles upon which the apportionment is to be made, so as to become an equitable apportionment. The various cases cited in the brief submitted, where the legislature has appointed parties to apportion stock in a bank created by its laws, etc., and where the courts have held that the apportionment by the board thus created was final, do not, we think, conclude us here. The principles are entirely different. But as the plaintiff herein has made no proof of any misappropriation or wrong-doing, we are of the opinion that, upon the first question argued, he has failed to show any right to an accounting by the defendant.

The second ground upon which an accounting was claimed, was that the account was complicated. There are undoubtedly many expressions in the books stating that, where accounts are so difficult and complicated that it would be impracticable to examine them upon a trial at *nisi prius*, equity takes jurisdiction of an action, even on that ground alone. To this effect are 1 Story, Eq. Jur. § 445; Will. Eq. Jur. 91; 3 Pom. Eq. Jur. § 1421. In note 4 of the last above cited section, after stating the rule as above mentioned (that the account should be so complicated that a court of law would be inconpetent to examine it at *nisi prius* with the necessary accuracy), it is said: "But, under the present practice in England, matters of account may now be referred to officers or referees, so that the rule, as above stated, can now hardly be followed." See Railway Co. v. Nixon, 1 H. L. Cas. 119–121. In speaking of an equitable jurisdiction to grant an accounting this court, in Marvin v. Brooks, *supra*, stated (per Finch J.) that "the best considered review of the authorities puts the equitable jurisdiction upon three grounds, viz: the complicated character of the accounts, the need of a discovery, and the existence of a fiduciary or trust relation. The necessity for a resort to equity for the first two reasons is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury, and furnishes, by an examination of the adverse party before a trial, and the production and deposit of books and papers, almost as complete a means of discovery as could be furnished by a court of equity." Judges in the English equity courts have been somewhat slow to maintain jurisdiction in a case where the ground thereof was solely that the account was complicated; and, although there are very many cases in which the statement has been made that equity would sometimes take jurisdiction on that account, yet in most of them it is seen that there were added to that other grounds making it proper for equity to assume cognizance of the cases. However it may be, it has at least been stated that whether or not the court would take

jurisdiction upon the sole ground of the account being complicated was a matter largely within the discretion of the court. See Railway Co. v. Martin, 2 Phil. Ch. 758; also Phillips v. Phillips, 9 Hare, 471, and Bliss v. Smith, 34 Beav. 508. We are not inclined to enlarge the principle, or to hold that in all cases the mere fact of a complicated account being at issue will oblige the court to take jurisdiction. Considering the fact as stated by Finch, J., in the case above alluded to, that the plaintiff has now all the facilities for examining a complicated account in an action at law that he would have in equity, if there are other reasons—important and material ones—existing against the assumption of jurisdiction by a court of equity of an action of this nature, those reasons should have their full weight; and if, after giving due effect to all the circumstances, it appears that there would be a balance of very great inconvenience and possible oppression to the defendant, the plaintiff should be remitted to his action at law to recover his damages, in which action, if the taking of an account becomes necessary, it may be easily taken. In such a case as this, we think there is such balance of inconvenience existing in favor of the defendant. Upon the theory of the plaintiff, every one of the policy-holders of this class has a right of action such as this against the defendant to call it to an account, and to cause it to give, in the trial of the action, a detailed account of every transaction (proved by reference to or the production of its books, and by the oaths of its officers) which took place, from the commencement to the termination of the tontine period, in regard to those matters material to be known upon the question of an equitable apportionment of the fund. There would be no necessity for an allegation, much less the slightest, even *prima facie*, proof of wrong-doing, or that there had been any mistake made by the company in the apportionment made by it. But the mere fact that an individual was the owner of one of those policies in force at the termination of the tontine period would give him a right of action, and a right to demand this proof from the defendant. The mere statement of such a fact, it seems to us, is conclusive against the existence of any such right. Of course, it is not to be supposed that each individual policy-holder would avail himself of this right; but the fact that each one might would place the company in the power of unscrupulous parties to take advantage of it for the purpose of endeavoring to levy contribution from it, which it might pay in order to secure freedom to itself from troublesome, expensive, unnecessary, and wholly disingenuous investigations (and made in numerous suits) into the affairs of the company, and its accounts, running through many years. That this should be permitted without an allegation, even on information and belief, that any fraud, mistake, or impropriety in the accounts, or in the manner of their statement, or in the result attained, had been made by the officers or agents of the company, would seem to be intolerable. Our attention has been called to a decision by the Massachusetts court of Pierce v. Society, 12 N. E. Rep. 858. That case was decided under the peculiar wording of a statute of Massachusetts in regard to complicated accounts, and we do not think it should be followed by the courts of this State.

Having examined the two grounds upon which the plaintiff based his right to maintain this action, and coming to the conclusion that neither is tenable, it follows that the general term of the common pleas correctly granted a new trial, and that its order to that effect should be affirmed, and judgment absolute given against the plaintiff, with costs.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ACTION—Pleading—Justices Courts—Statute.——A formal complaint is not necessary in an action under the statute regulating the practice of pharmacy, such action being brought in a justice's court.—*Cook v. People*, S. C. Ill., June 16, 1888; 17 N. E. Rep. 849.

2. AFFIDAVIT—Officer—Attorney. —— An affidavit in support of a motion for a new trial, verified before the attorney of record making such motion, should be stricken from the record. — *Schoen v. Sanderland*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 913.

3. AGENTS—Real Estate—Commissioners. —— When an agent for the sale of realty obtains purchasers, who

fail to buy because the owner's representations are not true and because he does not stand by his offers, such agent is entitled to his commissions.— *Hannan v. Moran*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 909.

4. ANIMAL—Vicious Dog—Negligence. —— The owner of a vicious dog is not liable for injuries inflicted by him upon persons who intermeddle with him, unless the owner has negligently omitted to take proper precautions. — *Worthen v. Love*, S. C. Vt., June 18, 1888; 14 Atl. Rep. 461.

5. APPEAL—Bond—Cost—Statute.—— Construction of Texas statutes relative to bond required for an appeal from a lower to a higher court, bonds for costs, and bonds to perform the judgment of the court. — *Crumley v. M'Kinney*, S. C. Tex., June 30, 1888; 9 S. W. Rep. 157.

6. APPEAL — Bond— Signature of Sureties. —— In an appeal in an action of forcible entry and detainer the sureties on the appeal bond need not sign it in the presence of the justice. — *State v. Clark*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 832.

7. APPEAL—Dismissed—Filing Transcript. —— A failure to have the transcript on file, when notice of a motion to dismiss for such failure is given, will not preclude appellant from setting up matters excusing his default. — *Carter v. Page*, S. C. Cal., June 27, 1888; 19 Pac. Rep. 2.

8. APPEAL—Errors— Brief. —— When on appeal it is claimed that the court erred in refusing to submit certain questions to the jury, but the counsel nowhere refers to evidence in the case making such submission proper, the court may overrule the point for that reason alone.—*Leroy, etc. R. R. v. Crum*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 944.

9. APPEAL — Error of Counsel. —— Where by inadvertence of counsel in drawing the answer and on trial evidence was allowed, which was barred by the statute of limitations, a new trial should not be granted.— *Barrows v. Fox*, S. C. Minn., July 3, 1888; 38 N. W. Rep. 777.

10. APPEAL—Evidence — Weight. —— Evidence held not to sustain a verdict against a master for putting his employee to work, where the latter did not know the danger and was not instructed relative thereto.—*Berger v. St. Paul, etc. R. R.*, S. C. Minn., July 3, 1888; 38 N. W. Rep. 814.

11. APPEAL— Extrajudicial Statements of Judge.—— A new trial will not be granted on appeal on evidence superinduced by extrajudicial statements of the trial judge, not in accord with the record of the proceedings of the trial.—*Brooks v. Dutcher*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 780.

12. APPEAL—Jurisdiction.——The New York court of appeals has no jurisdiction of cases in which the sum in controversy does not amount to $500. Circumstances stated under which it was held that the sum in controversy did not amount to $500.—*Campbell v. Mandeville*, N. Y. Ct. App., June 12, 1888; 17 N. E. Rep. 866.

13. APPEAL—Jurisdictional Amount.——The supreme court has no jurisdiction over a controversy as to the validity of a judgment rendered for less than the lower limit of its appellate judgment.—*Singer v. McGuire*, S. C. La., June 14, 1888; 4 South. Rep. 578.

14. APPEAL—Practice—Parties.——Where, in an action against the principal and sureties on a promissory note as joint makers, a judgment is rendered in the county court against all, and the principal removes it to the district court, a judgment on a finding for plaintiff may be rendered against all. — *Wilcox v. Raben*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 844.

15. APPEAL— Probate Court. —— The grantee of real estate by deed from an intestate whose conveyance was alleged to have been fraudulent, has a sufficient interest to authorize him to appeal from a decree of the probate court ordering the administrator to sell the land for the payment of debts. — *Allen v. Smith*, S. J. C. Me., Aug. 3, 1888; 15 Atl. Rep. 62.

16. APPEAL—Record—Amendment. ——When, on appeal from an order granting a new trial for insufficiency of evidence, the record does not show that it contains all the evidence, the court may send it back with leave to apply to the trial judge to correct the certificate on that point.—*Chesley v. Mississippi B. Co.*, S. C. Minn., July 3, 1888; 38 N. W. Rep. 769.

17. APPEAL—Record—Excluding Evidence.——Where the evidence is excluded, the bill of exceptions must show what evidence the party expected to elicit, if the appellate is expected to review the decision thereon. — *Tucker v. Constable*, S. C. Oreg., July 2, 1888; 19 Pac. Rep. 13.

18. APPEAL—Rehearing.—— A petition for a re-hearing, which assumes any ground or portion not taken before, should be denied under the rule of court.—*Sauls v. Freeman*, S. C. Fla., July 2, 1888; 4 South Rep. 577.

19. APPEAL— Reversal — Writ of Inquiry. —— Where peremptory *mandamus* is awarded by the lower court, and its action is reversed upon appeal, a writ of inquiry ordered by the lower court is abrogated by such reversal. — *Commonwealth v. Buffalo, etc. Co.*, S. C. Penn., May 25, 1888; 14 Atl. Rep, 449.

20. APPEAL—Review—Evidence. —— The sufficiency of the evidence to sustain the verdict will not be considered unless the motion for a new trial was passed on by the trial court.— *Barringer v. Stoltz*, S. C. Minn., July 3, 1888; 38 N. W. Rep. 808.

21. APPEAL—Review—Pleading.——Where the pleadings are loose and defective and no point is made on that fact in the court below, an appellate court will act as substantial justice requires. — *Furr v. Eddleman*, S. C. Ga., May 14, 1888; 7 S. E. Rep. 167.

22. APPEAL—Review— Waiver. —— All objections to evidence, which do not state the reasons therefor, will be disregarded on appeal. — *Smith v. Morrill*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 915.

23. APPEAL—Weight of Evidence. A general finding of the court will not be disturbed on appeal when there is sufficient evidence to uphold it, though there is other evidence against it.— *Hathaway v. Henderson*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 932.

24. APPEAL—Weight of Evidence. —— Evidence held to be sufficient to sustain the finding and judgment of the district court.— *Kennard v. Dibble*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 793.

25. APPEAL—Writ of Error—Service of Summons.—— Service of summons in error on the attorney who tried the case in the lower court is sufficient. — *Kinney v. Hickox*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 816.

26. ARBITRATION—Findings—Law and Fact.—— Where arbitrators have found the facts and conclusions of law separately, the judgment of the court affirming the award will not be reversed on the ground that the arbitrators have failed to so find.— *Westover v. Armstrong*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 843.

27. ASSUMPSIT—Contract.——In the absence of positive contract an action of *assumpsit* will not lie for services rendered in pumping out water from a lime quarry. — *Ulmer v. Farnsworth*, S. J. C. Me., Aug. 3, 1888; 15 Atl. Rep. 65.

28. ASSUMPSIT—Money Had and Received. —— Where a wife gave her husband for life all her property with power to sell any part thereof and appropriate the proceeds to his own use, and he pledged certain bonds to secure a debt and afterwards turned over the bonds to the payment of that debt, and a surplus of the bonds was afterwards remitted to his administrator (he being dead): *Held*, that the executor of the wife could not maintain *assumpsit* against the administrator of the husband for such surplus.—*Rhode Island, etc. Co. v. Manchester*, S. C. R. I., July 14, 1888; 15 Atl. Rep. 76.

29. ATTACHMENT — Affidavit — Indebtedness. —— An allegation, that A and B were jointly indebted to plaintiff, and that the same is now due from A upon express contract, does not vitiate an affidavit in attachment — *Sword v. Circuit Judge*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 870.

30. ATTACHMENT—County Judge — Presumption.——

Where a county signs the order officially granting an attachment on a debt not due, it will be presumed that he is judge of the county where the order is made, and that the district judge was absent from such county.—*Reed v. Bagley*, S. C. Neb., July 3, 1888; 38 N. W. Rep.827.

31. ATTACHMENT—Insolvency.—— The mere insolvency of the debtor is no ground for an attachment.—*Peru, etc. Co. v. Benedict*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 824.

32. ATTACHMENT—Realty — Interpleader. —— Where realty is attached a mortgagee thereof may be interplead.—*Bodwell v. Heaton*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 901.

33. BASTARDY — Evidence. —— Rule of evidence of paternity in bastardy cases.—*Clark v. Bradstreet*, S. J. C. Me., July 2, 1888; 15 Atl. Rep. 56.

34. BENEFIT SOCIETIES—Safety Funds—Insolvency.—Circumstances stated and terms set forth upon which and for what purpose a mutual benefit society provided a safety for the indemnity of certificate holders. Proceedings taken for the distribution of the fund after the insolvency of the society.—*Burdon v. Massachusetts, etc. Co.*, S. J. C. Mass., Sept. 4, 1888; 17 N. E. Rep. 874.

35. BILLS AND NOTES—Illegality—Bona Fide Holder.—A negotiable note, void at common law for illegality, but not contravening any statute, is valid in the hands of a holder for value receiving it in the course of business before maturity without knowledge of the illegality, although he may have had reason to believe it was given for an illegal consideration.—*Davis v. Seeley*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 901.

36. BILLS AND NOTES—Interest—Payment.——Where a note, bearing interest after maturity, is payable generally in a city, and neither party has an office or place of business there, if the payee uses due diligence to find the note and pay it, he will not be chargeable with interest, though he did not pay it on the day it fell due.—*Ansel v. Olson*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 939.

37. BONDS — County — Purchasers. —— Negotiable county bonds cannot be impeached in the hands of an innocent purchaser for value on account of irregularities in calling and holding the election to authorize their issue.—*State v. Hordey*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 942.

38. BOUNDARY—Deed—Instruction.—— Where, in an action of trespass, the question was as to the location of a line, and there is no testimony fixing the monuments indicated in the deed, the court may well instruct the jury that the plaintiff has not by the record shown the location of the line.—*Chase v. Martin*, S. J. C. Me., Aug. 4, 1888; 15 Atl. Rep. 68.

39. BRIDGES—Repairs—Mandamus. —— A *mandamus* will issue to compel the county commissioners to keep in repair a public bridge, which it is their duty to keep in repair, and for the construction of which the county has appropriated money, but it must be shown they have on hand money for repairs of bridges.—*State v. Bramwell*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 952.

40. CHATTEL MORTGAGE — Foreclosure — Judgment — Statute.——Construction of Texas statute relative to the foreclosure of chattel mortgages, judgment for such foreclosure, and proceedings to be taken to enforce such judgment.—*Frankel v. Byers*, S. C. Tex., June Term, 1888; 9 S. W. Rep. 160.

41. CONSIDERATION—Forbearance.—— Mere forbearance, without any binding contract to sue on a promissory note, is not a sufficient consideration to hold a third party liable who indorsed the note in blank after signature and delivery.—*Lambert v. Clewley*, S. J. C. Me., Aug. 3, 1888; 15 Atl. Rep. 61.

42. CONSTITUTIONAL LAW—Maritime Lien — Jurisdiction—Statute.——The statute of Maine which confers a maritime lien in favor of a person who, furnishing labor or material for the repair of a vessel, and intrusts the enforcement of such lien to State courts, is in conflict with the constitution of the United States, which gives to federal courts admiralty jurisdiction.—*Warren v. Kelley*, S. J. C. Me., Aug. 9, 1888; 15 Atl. Rep. 49.

43. CONSTITUTIONAL LAW—Statute.——The statute of New Hampshire, discriminating between the rights of citizens of that State and those of citizens of other States, with reference to lightning rods, is in violation of the constitution of the United States.—*State v. Wiggin*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 128.

44. CONTRACT—Consideration. —— Expense incurred on a trip to Europe by a nephew, at the instance and request of his uncles, is sufficient consideration for the latter's promise to reimburse him, though the trip was entirely for the nephew's benefit.—*Devecmon v. Shaw*, Md. Ct. App., June 13, 1888; 14 Atl. Rep. 464.

45. CONTRACT—Illegality—Officers.——A contract by an officer, appointed by the State to approve and accept a road, whereby the contractor was to convey to him an interest in the land to be taken in payment for his work, is void.—*Robinson v. Patterson*, S. C. Mich., July 11, 1888; 39 N. W. Rep. 21.

46. CONTRACT—Mill-tally—Custom.—— In a suit for cutting logs, under a contract to pay according to the mill-tally, testimony is admissible to show that mill-tally includes culls as well as merchantable lumber.—*Corneil v. New Era L. Co.*, S. C. Mich., July 11, 1888; 39 N. W. Rep. 7.

47. CONTRACT—Possession—Delivery.——An exchange of horses is complete when each of the parties has possession of the other party's horse.—*Cook v. Pinkerton*, S. C. Ga., May 25, 1888; 7 S. E. Rep. 171.

48. COPYRIGHT—Limited Edition.——Where the publisher of a copyrighted book sells copies thereof upon the assurance that the edition is limited and that no further edition will be issued, neither he nor his assignees in insolvency can thereafter issue a second edition of the work.—*In re Rider*, S. C. R. I., July 7, 1888; 15 Atl. Rep. 72.

49. CORPORATION—Division of Funds.—Stockholder.—Where the managers and directors of the corporation divert the assets to the use of one member, a minority stockholder may sue without applying to the corporation to sue. — *Rothwell v. Robinson*, S. C. Minn., June 18, 1888; 38 N. W. Rep. 772.

50. CORPORATIONS— Manager — Attorney. —— When the general manager of a railroad retains an attorney to attend to its legal business, the company must pay him, unless the general manager had no authority to retain him, and by ordinary diligence the attorney might have known it.—*St. Louis, etc. R. Co. v. Grove*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 958.

51. CORPORATIONS—Officers—Authority.—— Where a party expends money for a corporation under the directions of its general manager and in accordance with its prevailing custom, he can recover therefor, although express authority was not conferred by its trustees.—*Topeka, etc. v. Martin*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 941.

52. COSTS—Criminal Cases—Jurisdiction.——The district court has no authority to enforce the payment of costs adjudged against the defendant in a proceeding to prevent the commission of an offense by imprisonment.—*In re Mitchell*, S. C. Kan., July 7, 1888; 19 Pac. Rep. 1.

53. COUNTIES—Organization—Injunction. —— An action to perpetually enjoin the governor from organizing a county, because the memorial upon which the census taker was appointed was insufficient and his returns were false, cannot be maintained, when those charges have not been brought to the attention of the governor.—*Lacy v. Martin*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 951.

54. COVENANT—Breach—Action—Notice—Demand. —— In an action for breach of covenant of warranty of land, it is not necessary, in order to recover costs of antecedent litigation, to aver and prove that notice of the amount of such costs had been given to the defendant, and demand of that sum made of him, such notice not being part of the covenant.—*Tarbell v. Tarbell*, S. C. Vt., Sept. 10, 1888; 15 Atl. Rep. 104.

55. CRIMINAL LAW—Assault — Self-defense. —— In a trial for assault with intent to do great bodily harm, an instruction is erroneous that, if defendant's belief as to the necessity for the use of force arose from want of courage and an unwarrantable cowardice under the circumstances then presented to him, he would not be excused on the ground of self-defense.—*People v. Lennon*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 871.

56. CRIMINAL LAW—Change of Venue — Recognizance. ——When a party charged with felony secures a change of venue to another county, and enters into a recognizance to appear before the district court there, and forfeits his recognizance, and his sureties pay it, the latter county is entitled to the money.—*State v. Speice*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 839.

57. CRIMINAL LAW—Complaint and Warrant—Amendment.——An amendment by a justice of a warrant describing stolen goods as the property of Allen Brinker, issued upon a complaint for the larceny of the goods of Allen Bricker, so as to make it correspond with the complaint, is not a ground for quashing an information in the case.—*People v. Hilderbrand*, S. C. Mich., July 11, 1888; 30 N. W. Rep. 919.

58. CRIMINAL LAW—Deceased Witness — Deposition.—When the prosecuting witness is dead, her deposition, taken on the preliminary examination before the justice, may be admitted in evidence.—*People v. Dowdigan*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 920.

59. CRIMINAL LAW—False Pretenses—Indictment. —— An information, charging the obtaining of the signature of A to a promissory note by false and fraudulent representations as to B company, of which defendant claimed to be agent, which does not state their consideration, to whom payable, whether negotiable, nor whether they were used in dealings with such company, is insufficient.—*People v. Brown*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 916.

60. CRIMINAL LAW—Larceny—Advice of Counsel.—— In a case of larceny, evidence that the property taken had belonged to defendant, and was seized and sold on execution, that it was exempt from seizure, and that defendant took it under advice of counsel that he had a right so to do wherever he could find it, is admissible for defendant.—*People v. Schultz*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 868.

61. CRIMINAL LAW—Larceny—Value.——On a trial for larceny it is not necessary that the jury should find the value of the property stolen. — *Cole v. State*, S. C. Miss., May 21, 1888; 4 South. Rep. 577.

62. CRIMINAL LAW—Mittimus—Omission of County.—— A *mittimus* entitled "The State of Nebraska:—— county" is not void, and even if defective the court should cause a proper one to be issued. — *State v. Banks*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 830.

63. CRIMINAL LAW — Obstructing Justice. —— An information charging A with obstructing a constable in his effort to maintain the peace, which fails to show the act of the officer wherein he was obstructed and the act of A constituting the obstruction, states no offense. — *People v. Hamilton*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 921.

64. CRIMINAL LAW— Preliminary Examination — Warrant.——Although the charge stated in the coroner's warrant is not as full as it should have been, it is too late to challenge its sufficiency after the preliminary examination is concluded and the defendant is bound over. — *State v. Tennison*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 948.

65. CRIMINAL LAW—Rape—Statements. —— On a trial for rape of a child under 14 years of age the mother may testify as to a statement as to the perpetrator made by the child 13 days thereafter, it appearing that the child had concealed it from her through fear of being whipped. — *People v. Glover*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 874.

66. CRIMINAL LAW—Rape—Unchastity.——In a prosecution for rape, statements by the prosecutrix as to sexual intercourse with other parties are incompetent. —*People v. McLean*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 917.

67. CRIMINAL LAW—Trial—Jury.—— A defendant in a criminal case may consent to try his case before eleven jurors, when the court permits and the State does not not object. — *State v. Sackett*, S. C. Minn., July 3, 1888; 38 N. W. Rep. 773.

68. DECEIT—Action — Newspapers. —— In an action for damages in the sale of a newspaper in misrepresenting its circulation, it must be alleged and proved that the purchaser relied on such representation. — *White v. Smith*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 931.

69. DEED — Covenants. —— Covenants in a deed do not extend to a title already vested in the covenantee. —*Horrigan v. Rice*, S. C. Minn., June 26, 1888; 38 N. W. Rep. 765.

70. DIVORCE — Abandonment. —— The evidence did not support a claim for divorce on the ground of abandonment.—*Allen v. Allen*, S. C. Ala., June 13, 1888; 4 South. Rep. 590.

71. DIVORCE—Custody of Children—Jurisdiction.—— The jurisdiction of courts in divorce cases with reference to the custody of children is complete and plenary. A court may in proper cases authorize the removal of a child from the State.—*Stetson v. Stetson*, S. J. C. Me., Aug. 3, 1888; 15 Atl. Rep. 60.

72. DIVORCE — Partition — Sale. —— Circumstances stated under which it was held in a divorce case, that a sale made by the husband of one-half in value of a tract of land held by husband and wife as community property is valid, the wife being entitled to the other half. — *Goode v. Jasper*, S. C. Tex., June 5, 1888; 9 S. W. Rep. 132.

73. DOWER — Fraud. —— A widow is not entitled to dower in lands conveyed a few hours before her marriage by her husband to his son for a valuable consideration, no fraud being shown.—*Champlin v. Champlin*, S. C. R. I., July 17, 1888; 15 Atl. Rep. 85.

74. DRAINAGE—Establishment— Estoppel. —— Land owners, who petitioned to have a drain constructed, and gave a right of way, and assented to all the proceedings, but objected to the tax therefor, cannot complain of irregularities occurring before their objection. — *Cook v. Covert*, S. C. Mich., July 11, 1888; 39 N. W. Rep. 47.

75. EJECTMENT—Damages — Wild Land. —— Where the land claimed was uninclosed and unimproved prairie land, and the defendant was not in actual possession and received no profit therefrom, no damages for use and occupation can be awarded against defendant.—*Griffey v. Kennard*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 791.

76. ELECTION—Bribery — Selling Vote. —— An indictment which states that defendant in consideration of one dollar agreed to vote for a named person for a public office charges an offense against the law. — *Hensley v. Commonwealth*, Ky. Ct. App., June 16, 1888; 9 S. W. Rep. 129.

77. EMINENT DOMAIN—Damages—Jury. —— In a case of condemnation for a railroad the jury may be interrogated as to any particular element of the damages suffered by reason of the construction of the road over the land. — *Leroy, etc. R. R. v. Hollis*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 947.

78. EMINENT DOMAIN — Damages — Witness. —— A farmer, who resides in the vicinity of farming land and knows its situation, quality, advantages and disadvantages, and states that he knows its market value, may give his opinion as to its value in a condemnation proceeding. — *Leroy, etc. R. R. v. Hawk*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 943.

79. EQUITY— Accounting — Acquiescence.——Where, upon a bill for accounting, matters not stated in the bill are included in the account and are not objected to, a decree founded upon the account is valid. — *Moore v. Swanton, etc. Co.*, S. C. Vt., Sept. 10, 1888; 15 Atl. Rep. 114.

80. EQUITY—Bill of Review—Laches.—— A bill which, though filed as an original bill, is a bill of review, not

sworn to, nor accompanied by a sworn showing, filed after long delay, without leave or security, as required by rule of court, should be dismissed.—*Sanford v. Haines*, S. C. Mich., June 22, 1888; 38 N. W. Rep. 777.

81. ESTOPPEL—Judgment—Deceit.——A judgment on an action for deceit in the transfer of a promissory note for worthless mining stock, estops the indorser from interposing the deceit as a defense against the holder of the note.—*Morrill v. Prescott*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 123.

82. EVIDENCE—Documents—Notice—Statute. ——Under the statute of Rhode Island a party may by application to the court require his adversary to produce documentary evidence, and no previous notice to such adversary is required by the statute.—*Congdon v. Aylesworth*, S. C. R. I., July 7, 1888; 15 Atl. Rep. 73.

83. EVIDENCE—Experts — Homicide. —— A medical expert called in a murder case may state that his opinion is based upon standard works, but he cannot be compelled to name the books, nor can they be produced, except to contradict a witness who has stated that a certain book contains certain propositions.—*People v. Vanderhoof* S. C. Mich., July 11, 1888; 39 N. W. Rep. 28.

84. EVIDENCE—Sidewalks—Accidents.——In an action for damages for injuries received by a fall on a sidewalk, plaintiff can show, that while it remained in that condition other accidents occurred at that place, and, where it is built of defective material and is of bad construction, that accidents have occurred on the parts so built though not at this precise spot.—*City of Topeka v. Sherwood*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 933.

85. EVIDENCE — Writing — Parol. —— A written contract for the sale of land, which does not state the whole contract, does not preclude evidence of parol contemporaneous statements of the vendor as to the quality and condition of the land. — *Schoen v. Sanderland*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 913.

86. EXECUTION— Dormant Judgment —Payment.—— Payment made on an execution issued on a dormant judgment cannot be recovered back. — *Gerecke v. Campbell*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 847.

87. EXECUTIONS—Supplemental Proceedings—Statute. ——In a proceeding for discovery in aid of execution it is not necessary that an execution should be asked for or issued against lands and goods. It is sufficient to issue the execution against goods and chattels of defendant only.— *Westfall v. Dunning*, S. C. N. J., June 7, 1888; 14 Atl. Rep. 486.

88. EXECUTORS—Advances—Settlement. ——Advances by an administrator diverted to other than plantation purposes cannot be allowed a privilege. — *Succession of Osborn*, S. C. La., June 15, 1888; 4 South. Rep. 580.

89. EXECUTORS— Judgment Against — Relief. —— At common law a judgment against an executor, who did not plead plene administravit or præter, is conclusive evidence of assets in a second action of debt suggesting a devastavit, except the administration of assets, arising thereafter without his fault, might be set up. — *Brenner v. Alexander*, S. C. Oreg., July 7, 1888; 19 Pac. Rep. 9.

90. EXECUTOR—Powers— Promissory Note— Mortgage. ——An executor appointed in another State having acquired a promissory note secured by mortgage on land in New Hampshire may assign such note and mortgage and the holder may sue thereon in his own name.—*Gove v. Gove*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 121.

91. EXECUTORS—Sales—Legacies.——Where the record shows that there would have been sufficient assets of an estate to pay the debts if it had been properly administered, a decree, directing the sale of only enough real estate to pay a legacy, is proper.—*Ireland v. Miller*, S. C. Mich., July 11, 1888; 39 N. W. Rep. 16.

92. EXEMPTIONS——Returning List. —— The exemption as to his team of work horses is not lost by the debtor's failure to include all his personal property in the list returned to the officer, it appearing that he owns no other team, under Washington Territory law. —*Mikkleson v. Parker*, S. C. Wash. Ter., Feb. 1, 1888; 19 Pac. Rep. 31.

93. FACTORS—Advances—Consignments.—— A factor, to whom the principal is indebted for advances made, is not liable for loss from a falling market, occasioned by holding a consignment after the maturity of the time draft drawn against it.—*Lockett v. Baxter*, S. C. Wash. Ter., Jan. 16, 1888; 19 Pac. Rep. 23.

94. FALSE IMPRISONMENT—Aiding Sheriff. —— Under Michigan law, a person is justified in aiding the sheriff in making an arrest, if so required by the sheriff, and he does nothing wantonly nor beyond what he is required to do, though the sheriff's acts are without authority.—*Firestone v. Rice*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 885.

95. FIXTURES—Machinery.—— Where, in a conveyance of a mill privilege by metes and bounds, there is a clause giving the right for two years to use certain machinery, that machinery would be regarded as personalty, not as fixtures.—*Merrill v. Wyman*, S. J. C. Me., Aug. 3, 1888; 15 Atl. Rep. 58.

96. FRAUDULENT CONVEYANCES—Pre-existing Debt.—— A creditor may receive from an insolvent debtor property in payment of a pre-existing debt, if its fair value does not exceed such debt, without being chargeable with delaying or defrauding his creditors.—*Ellwood v. May*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 793.

97. GAME LAWS—Game Killed in other States.—— Michigan laws do not prohibit the having in possession and exposing for sale at any time quail killed in another State.—*People v. O'Neil*, S. C. Mich., July 11, 1888; 39 N. W. Rep. 1.

98. HUSBAND AND WIFE—Fraudulent Conveyances.—— A debtor in failing circumstances may secure a *bona fide* debt due to his wife by conveying enough property to her to satisfy it, though his other creditors thereby obtained nothing.—*Cooper v. First N. Bank*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 937.

99. HUSBAND AND WIFE—Note—His Debt.—— A note signed by a wife, with her husband, to obtain money to put into his business, in which she is interested only as a creditor, is, under Michigan law, void as to her.—*Littlefield v. Dingwall*, S. C. Mich., July 11, 1888; 39 N. W. Rep. 38.

100. HUSBAND AND WIFE — Verdict — Creditor. —— Where a verdict is against a wife's interest in a contest with her husband's creditors, that fact is no evidence against the validity of the verdict; juries may be trusted to do justice to wives.—*Morgan v. Swan*, S. C. Ga., May 21, 1888; 7 S. E. Rep. 170.

101. INFANTS—Guardians— Appointment. —— In the question of intrusting orphan children to testamentary guardians or guardians appointed by court, the good of the child is superior to all other considerations.—*In re Stockman*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 876.

102. INSOLVENCY—Limitation of Actions—Statute.—— Construction of Maine statute relative to insolvency. When the statute of limitations will bar a claim provable in insolvency proceedings.— *Trafton v. Hill*, S. J. C. Me., Aug. 7, 1888; 15 Atl. Rep. 64.

103. INSURANCE — Application — Misrepresentation — Waiver—Notice.——A demand by an insurance company of two assessments after notice of a misrepresentation made in the application is a waiver of such misrepresentation. Notice to the clerk of an insurance company held to be notice to the company.— *Fitzgerald v. Hartford, etc. Co.*, S. C. Conn., January Term, 1888; 13 Atl. Rep. 673.

104. INSURANCE—Application—Warranty. —— Where the application is made a part of the policy of insurance and its statements made warrantees, a false statement as to incumbrances on the premises vitiates the policy.—*State I. Co. v. Jordan*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 839.

105. INSURANCE — Mutual Benefit. —— Where, by a certificate of a mutual benefit society, the benefit is payable as the beneficiary may direct, the last certifi-

cate issued controls the destination of the fund.—*Knights of Honor v. Watson*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 125.

106. INSURANCE—Risk—Approval.——When an application for insurance is written on the regular blanks, which provide that liability shall not attach until the application has been approved at the home office, and the house burns down before such approval, the insurance company is not liable, though the premium had been delivered to the local agent.—*Pickett v. German, etc. Co.*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 903.

107. INTEREST—Writing.——No contract for interest in excess of seven per cent. can be enforced unless in writing.—*Wenger v. Taylor*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 911.

108. INTOXICATING LIQUORS—Nuisance—Indictment.—An indictment will lie against one who knowingly permits his property to be used for the sale of intoxicating liquors, such sale being a nuisance.—*State v. Pierce*, S. J. C. Me., Aug. 4, 1888; 15 Atl. Rep. 68.

109. INTOXICATING LIQUORS—Police Courts. —— A statute attempting to give exclusive jurisdiction to the Grand Rapids police court over all misdemeanors there committed, cannot give it jurisdiction over violations of the Sunday clause of the Michigan liquor law of 1887. —*People v. Mangold*, S. C. Mich., July 11, 1888; 39 N. W. Rep. 6.

110. INTOXICATING LIQUORS—Sales—Neighborhoods.—The law of 1887, prohibiting the sale of liquors within one mile of the soldiers' home, even though the buildings were so used before the establishment of the home, is constitutional.—*Whitney v. Township Board*, S. C. Mich., July 11, 1888; 39 N. W. Rep. 40.

111. JUDGMENT—Foreign—Cognovit.—— A judgment entered in another State on a judgment note and *cognovit*, duly certified, constitutes a cause of action in this State. — *Nichols v. Farwell*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 820.

112. JUDGMENT—Rendition—Entry.——In the county court a judgment was entered: It is the opinion of the court that A is indebted to the plaintiff in $100 and $3 attorney's fees, together with the costs of this suit, $4.25: *Held* that, though informal, the judgment was not void.—*Black v. Cabon*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 779.

113. JUDGMENT—Res Adjudicata.—— Where plaintiff has in a hypothecary action against a third possessor to obtain recognition of his mortgage on the property, obtained a contradictory judgment that the property be sold to satisfy his claim, and has issued execution, defendant cannot set up, as grounds for an injunction against the execution, any matters which he might have urged as defenses to the suit.—*Ludeling v. Chaffe*, S. C. La., June 15, 1888; 5 South. Rep. 586.

114. JUDGMENT—Revival—Mistake.——Where a judgment by mistake recites that it was rendered for purchase money, that mistake cannot be interposed to prevent a revival of the judgment. — *Hammond v. McClure*, S. C. Penn., May 25, 1888; 14 Atl. Rep. 412.

115. JUDGMENT—Vacation — Review — Evidence. —— Where a partner seeks to have a judgment against the firm vacated on the ground that the firm name was, without authority, signed as security to the note on which the judgment was rendered: *Held*, that the only proper inquiry was as to the question whether due diligence had been used in setting up the defense before the judgment was rendered, and that the plaintiff could not be relieved, as the evidence on that point was conflicting.—*Sugg v. Thornton*, S. C. Tex., May 8, 1888; 9 S. W. Rep. 145.

116. JUDGMENT—Vacation—Statute.——Where judgment has been rendered in a State court against two defendants, and erroneously removed to a federal court at the instance of a third defendant, the State court has jurisdiction when the cause is remanded to vacate the judgment, notwithstanding the State statute on that subject, which does not apply to such cases.—*Jansen v. Grimshaw*, S. C. Ill., June 15, 1888; 17 N. E. Rep. 850.

117. JURY—Disqualification—Aliens — Evidence. —— An alien is not qualified to act as a juror. Evidence that a juror, after he had acted as such, took out naturalization papers is proof of his alienage.—*Richards v Moore*, S. C. Vt., Sept. 11, 1888; 15 Atl. Rep. 119.

118. LANDLORD AND TENANT—Distress for Rent — Evidence.——Proof that a crop was on the premises when the levy was made is proof that it was in the tenant's possession.—*Andrew v. Stewart*, S. C. Ga., May 16, 1888; 7 S. E. Rep. 169.

119. LANDLORD AND TENANT—Lease.——Notice by the leasee of a store given to the lessor that he had sold out the stock of goods, and desired that the bill for rent should thereafter be presented to the purchaser does not terminate the lease.—*Kendall v. Hill*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 124.

120. LIBEL—Damages — Wealth of Defendant. —— In Nebraska, exemplary damages are not recoverable in libel cases, and evidence as to the wealth of the defendant is not admissible. — *Rosewater v. Hoffman*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 857.

121. LIBEL—Words Actionable per se. —— Defendant said "For some months I have missed things from my laundry—gentlemen's wear. Jennie (the plaintiff) has stolen them, and I have come to search your house:" *Held*, that the words were actionable *per se*. — *Belle v. Fernold*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 910.

122. LICENSES—Drummers.—— A city cannot impose a license tax on a commercial drummer of another State for offering to sell goods by sample, which must be brought from another State, where the owner thereof resides. — *City of Fort Scott v. Pelton*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 954.

123. LIENS—Crops—Beneficiaries.——A party engaged in threshing grain for others has, under Washington Territory law, a lien thereon for his own labor, including the use of his threshing-machines and teams, but not for the labor of others employed by him in so doing. — *Mohr v. Clark*, S. C. Wash. Ter., Jan. 28, 1888; 19 Pac. Rep. 28.

124. LIMITATIONS—Acknowledgment — Evidence. —— The decision of trial court, that a suit for a balance due on a promissory note was not barred, was sustained because it did not appear when the suit was brought defendant had acknowledged the debt and paid a part thereof by giving a new note within the statutory limitation. — *Pracht v. McNee*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 925.

125. LIMITATIONS— Interruption by Arbitration.——A submission to arbitration of the matters embraced in a subsequent litigation, and a suit in affirmance of the award, praying that it be made executory, constitute a legal interruption of prescription. — *Myer v. Ludeling*, S. C. La., June 15, 1888; 4 South. Rep. 583.

126. MARRIED WOMAN—Separate Estate — Trust — Executor.——Where an executor holds bonds in trust for a married woman, he cannot withhold from her as much of the income as may be necessary to pay taxes on those bonds. — *Gould v. Graves*, S. J. C. Me., Aug. 7, 1888; 15 Atl. Rep. 63.

127. MASTER AND SERVANT— Defective Appliances.—— A pulley fell and hurt the plaintiff, due to the fact that the nut securing a wheel was not properly put on, which defect was known to the master but not to the employee: *Held*, that the master was liable. —*Columbia, etc. R. R. v. Hawthorn*, S. C. Wash. Ter., Jan. 16, 1888; 19 Pac. Rep. 25.

128. MISNOMER—Arbitration. —— A misnomer by inserting the wrong middle initial letter of the name of an arbitrator will not vitiate the award. — *Riley v. Hicks*, S. C. Ga., May 25, 1888; 7 S. E. Rep. 173.

129. MORTGAGE—Foreclosure—Parties.—— Where one claiming a lien is made a party defendant in an action to foreclose a mortgage on realty and does not appear, and his lien is not recognized on the decree, he will not

be permitted to answer setting up his lien after a sale under the decree, unless he shows sufficient cause for the delay. — *Graves v. Fritz*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 819.

130. MORTGAGE—Foreclosure—Purchaser.—A trustee in a mortgage sold the land under the power to the mortgagee, but did not make him a deed, but subsequently conveyed the mortgage with all his rights thereunder to the mortgagee's grantee, and the mortgagor acquiesced therein for 14 years: *Held*, that such grantee is entitled to a decree vesting in him all the mortgagor's interest.—*Brunson v. Morgan*, S. C. Ala., June 13, 1888; 4 South. Rep. 589.

131. MORTGAGE — Foreclosure — Sale — Bar. —— An abortive attempt to foreclose a mortgage by advertisement may transfer the mortgagee's rights to the purchaser, and his possession for ten years will bar the mortgagor. — *Rogers v. Benton*, S. C. Minn., June 26, 1888; 38 N. W. Rep. 765.

132. MORTGAGE—Foreclosure— Surplus. —— When a creditor and the divorced wife of the mortgagor claim the surplus from the sale of his mortgaged property, and the record does not show the grounds for the divorce, the supreme court cannot award the surplus to the creditor. — *Bowles v. Hoard*, S. C. Mich., July 11, 1888; 39 N. W. Rep. 24.

133. MORTGAGES — Sheriff's Expenses. —— A vendor, seizing a plantation securing his claim, has a right to make advances to work it and to oversee it, with the sheriff's consent, and is entitled to recover his advances and pay for his services. — *Lockhart v. Morey*, S. C. La., June 13, 1888; 4 South. Rep. 581.

134. MUNICIPAL CORPORATIONS—Contracts—Bonds.—— Plaintiff bid on a township bridge and was awarded the contract and built the bridge, which was never accepted or used by the township. He had not given bond as required by law: *Held*, that there was no valid contract and plaintiff could not recover. — *Mackey v. Columbus Township*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 901.

135. MUNICIPAL CORPORATIONS — Officers — Elections. —— The law as to the election of officers of a city, which from a third-class city has become a second-class city.—*Moser v. Shamleffer*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 956.

136. NEGLIGENCE—Contributory— Jury. —— Plaintiff working in a mine was struck by a skip-car, which the men used as a convenient mode of descending, while he was walking on the incline track, no signal having been given: *Held*, that the question of plaintiff's contributory negligence was properly submitted to the jury.—*Luke v. Wheat M. Co.*, S. C. Mich., July 11, 1888; 39 N. W. Rep. 13.

137. NEGLIGENCE—Dangerous Premises. ——An agricultural society is liable, to a person lawfully in attendance upon their public exhibition, for injuries caused by their grounds not being in a reasonably safe condition. — *Selinas v. Vermont, etc. Co.*, S. C. Vt., Sept. 10, 1888; 15 Atl. Rep. 117.

138. PARTITION—Suit—Possession. —— Partition may be granted, though the property is held adversely to the plaintiff. — *Bonham v. Weymouth*, S. C. Minn., July 3, 1888; 38 N. W. Rep. 805.

139. PARTNERSHIP—Firm Creditor — Private Creditors. ——Where a surviving partner institutes proceedings in insolvency, firm assets will be applied first to the satisfaction of firm liabilities and private assets to the discharge of private liabilities. — *Colewell v. Weybossett, etc. Co.*, S. C. R. I., July 14, 1888; 15 Atl. Rep. 80.

140. PARTNERSHIP—Private Debt— Presumption.—In an action by partners to recover the proceeds of a check by one of them on partnership funds to pay an individual debt to A, it may be presumed, without allegations to the contrary, that the check was given on account of the partner's interest from profits in the business of the firm. — *Warren v. Martin*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 849.

141. PHYSICIANS—Christian Scientists—Assumpsit. —— An action of *assumpsit* will lie to recover compensation for services rendered by one practicing the healing art according to the method known as that of the "Christian Scientist." — *Wheller v. Sawyer*, S. J. C. Me., Aug. 7, 1888; 15 Atl. Rep. 67.

142. PLEADINGS— Amendments — Inconsistency. —— Where an amended petition is filed, and the counts are inconsistent, the proper motion is to strike out the inconsistent matter or to compel the plaintiff to elect.—*Keens v. Gaslin*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 797.

143. PLEADING—Carriers—Passenger. —— A complaint, that while the plaintiff was a passenger on a train defendant violently and maliciously put him off, whereby he was injured, states an action in tort, and proof that plaintiff was a trespasser on the train constitutes no variance.—*Mykelby v. Chicago, etc. R. R.*, S. C. Minn., June 26, 1888; 38 N. W. Rep. 763.

144. PLEADING — Counterclaim — Demurrer. —— An objection that a cause of action is not a proper counterclaim must be raised by demurrer, or is waived. — *Lace v. Foxen*, S. C. Minn., June 26, 1888; 38 N. W. Rep. 762.

145. PLEADINGS—Counterclaims— United States. —— In suits by the United States defendant may make a counterclaim or set-off of claims presented to the proper accounting officers and disallowed by them. — *United States v. Hart*, S. C. Ariz., July 28, 1888; 19 Pac. Rep. 4.

146. PLEADING—General Denial—Payment. ——In an action for services payment thereof cannot be proved under a general denial. — *St. Louis, etc. R. R. v. Grove*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 958.

147. PLEADING—Striking from Files. —— A motion to strike a petition from the files is proper only in cases where there is a defect in matters of form required by the statute, and is waived by making objections to the matters in the petition itself. — *Hershiser v. Delone*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 863.

148. POWER— Execution — Quit Claim. —— Where a devisee holding a life estate with power to sell conveys the property to hold for her benefit, and afterwards executes a quitclaim deed to the trustee to the whole estate, such deed carries with it the grantor's life estate. — *Phillips v. Brown*, S. C. R. I., July 7, 1888; 15 Atl. Rep. 90.

149. POWERS—Testamentary Powers—Will—Construction. —— Where a widow held by the will of her husband all his property for her life with power to sell as much of it as was necessary for her support, the trust was personal to her, and a trustee to whom she had conveyed all the property to hold in trust for her took only an estate for her life. — *Phillips v. Wood*, S. C. R. I., Feb. 19, 1887; 15 Atl. Rep. 88.

150. PRACTICE—Joinder—Husband and Wife. ——It is not reversible error to join a wife as coplaintiff with her husband in an action for damages done to the wife's separate estate.—*Lee v. Turner*, S. E. Tex., June 22, 1888; 9 S. W. Rep. 149.

151. PRACTICE — Jury — Waiver. —— Defendant demanded a jury on the original complaint, but, after it had been amended, went to trial without redemanding a jury, but requested the appointment of a receiver: *Held* that, under Washington Territory law, there was no waiver of a jury. — *Meeker v. Gilbert*, S. C. Wash. Ter. Jan. 18, 1888; 19 Pac. Rep. 18.

152. PRACTICE—Prejudice of Juror—Waiver. —Where a new trial is sought on the ground that a juror had expressed an opinion in the case a short time before the trial, his examination on the *voir dire* must be preserved in the record. The failure to examine a juror on his *voir dire* as to any particular matter is a waiver of objection therefor.— *Everton v. Estate*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 794.

153. PRACTICE—Trial—Instructions. —— Instructions held erroneous, because they based the right to recover on certain facts, whereas the evidence tended to prove other facts, which facts might authorize a recovery. — *Graham v. Burlington, etc. R. R.*, S. C. Minn., July 3, 1888; 38 N. W. Rep. 812.

154. PRINCIPAL AND AGENT— Authority — Ratification. ——Where an agent without authority from his prin-

cipal makes a sale upon conditions, his principal cannot ratify the sale and repudiate the conditions. — *Billings v. Mason*, S. J. C. Me., Aug. 3, 1885; 15 Atl. Rep. 59.

155. PRINCIPAL AND AGENT — Interest —— Where an agent mixes his principal's money with his own by depositing it to a general bank account, he is liable for interest. — *Blodgett's Estate v. Converse's Estate*, S. C. Vt., Sept. 8, 1888; 15 Atl. Rep. 100.

156. PRINCIPAL AND SURETY — Bond — Estoppel. —— One who signed a guardian's bond on condition that others should sign it, is not estopped from showing such condition, because the principal obtained the appointment and acted under it, it not being shown that he knew of the appointment till a short time before the guardian's settlement, when he took prompt measures to avert injury resulting from the use of his name. — *Evans v. Doughtry*, S. C. Ala., March 22, 1888; 4 South. Rep. 592.

157. PROCESS—Privilege.——A non-resident, party to a suit is not privileged while in attendance upon the court, from service of a summons in another suit. — *Baldwin v. Emerson*, S. C. R. I., July 14, 1888; 15 Atl. Rep. 83.

158. PROMISSORY NOTE — Consideration — Forebearance.——It is not a sufficient consideration for a note that the plaintiff had forborne to prosecute a suit upon a claim which had never been presented against an administrator and which exceeded the jurisdiction of the justice before whom the suit was brought. — *Von Brandenstein v. Ebensberger*, S. C. Tex., June 26, 1888; 9 S. W. Rep. 153.

159. PUBLIC LAND—Mandamus— Fees. —— *Mandamus* will not lie against the commissioners of public lands to compel the issuance of patents for lands earned in the construction of the State capital without the payment of the patent fees.—*Taylor v. Hall*, S. C. Tex., June 15, 1888; 9 S. W. Rep. 148.

160. PUBLIC LANDS—Patent—Survey.——In a controversy relating to the boundaries of land, the lines indicated by the public survey are conclusive if the survey has merged into a patent. — *Forbis v. Withers*, S. C. Tex., June 29, 1888; 9 S. W. Rep. 154.

161. PUBLIC LANDS—Patentee—Statute.——A patentee of public lands cannot maintain an action against the commissioner of public lands individualy for money paid under protest and, as the patentee alleges, wrongfully. This remedy is by an action provided for that purpose by the statute laws of Texas.—*Taylor v. Hall*, S. C. Tex., June 15, 1888; 9 S. W. Rep. 141.

162. PUBLIC LANDS — Sales — Quantity. —— Where A has purchased the maximum quantity of school lands under the law, he may take an assignment of another and may obtain a deed therefor.—*Gliem v. Board of Commissioners*, S. C. Oreg., July 28, 1888; 19 Pac. Rep. 16.

163. PUBLIC LANDS—Statute—Leasing. —— Construction of the statutes of Texas relative to public lands situated in Greer county, their appropriation for the public debt and the procedure for the leasing thereof.—*State v. Day Land, etc. Co.*, S. C. Tex., June 22, 1888; 9 S. W. Rep. 130.

164. QUIETING TITLE—Possession— Allegation. —— A bill to quiet title by one out of possession must allege no adequate remedy at law and grounds for equitable relief. — *Ely v. New Mexico, etc. R. R.*, S. C. Ariz., 1888; 19 Pac. Rep. 6.

165. QUO WARRANTO—Office—Possession.——A party, eligible thereto, duly elected and qualified as county treasurer, is entitled by *quo warranto* to recover the possession of the office.—*State v. Board of Commissioners*, S. C. Kan., 1888; 19 Pac. Rep. 2.

166. RAILROADS COMPANIES—Municipal Aid. ——Where the people of a township have voted to aid a railway company by taking stock therein, the company has no right under the Indiana statutes to demand the money as a doantion.—*Board of Commissioners v. State*, S. C. Ind., July 10, 1888; 17 N. E. Rep. 855.

167. REAL ESTATE—Title — Possession. —— In the absence of adverse holding, possession of land is in him who has the title.—*Gildehaus v. Whiting*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 916.

168. REPLEVIN—Logs— Damages. —— Defendant had cut the logs replevied on land, which he claimed under a tax-title, the law under which his tax title was issued had been declared unconstitutional six months before. Plaintiff waived a return of the logs: *Held*, that the damages were the value of the logs when replevied with interest from that date.— *Nitz v. Bolton*, S. C. Mich., July 11, 1888; 39 N. W. Rep. 15.

169. SALE—Approval—Return.——Where a purchaser of personalty is allowed 30 days in which to try the article received, he must pay for it unless he offer to return it within 30 days.—*Latham v. Bausman*, S. C. Minn., July 3, 1888; 38 N. W. Rep. 776.

170. SALE—Fraud—Rescission. —— Where by the fraud of B personal property is sold by A to him, and he in turn sells it to C, A can rescind the sale and recover the property provided he can put B and C in *statu quo;* if, however, C took the property in payment of a pre existing debt, A can disregard him.— *Henderson v. Gibbs*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 926.

171. SALE—Passing Title.——A agreed to saw and sell to B a quantity of lumber, the sorting and inspection to be final when loaded into the cars. A quantity of the sawn lumber was piled in the yard, where it was burned: *Held*, that the title had not passed to B.— *Wagar v. Larrin*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 865.

172. SALE—Tender—Delivery.——A tender of 53 tons of scrap-iron is not sufficient where the contract was for 30 tons of iron. It is not a waiver of the objection that the only complaint made by the purchaser related to the quality of the scrap-iron.—*Berry v. Moune, etc. Co.* S. C. R. I., July 17, 1888; 15 Atl. Rep. 87.

173. SALE—Trover.——An action of trover cannot be maintained for the alleged conversion of a quantity of oats which by contract was to have been taken from a bin containing a larger quantity.—*Jeroulds v. Brown*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 123.

174. SALE—Warranty—Representations. —— The representations of the seller of an engine and boiler, as to their qualities are warranties, if the buyer relies upon them, and the seller knows that he does so. — *Drew v. Edmunds*, S. C. Vt., Sept. 8, 1888; 15 Atl. Rep. 100.

175. SCHOOLS—Moneys—Mandamus. ——*Mandamus* is not the proper remedy to compel school directors to pay into the county treasury money received by them as such, when they have expended it, rightly or wrongly.— *Elder v. Territory*, S. C. Wash. Ter., Jan. 28, 1888; 19 Pac. Rep. 29.

176. SCHOOL—School Lands — Venue. —— An action for the rents of school lands leased by the State of Texas should be brought in the county where such lands lie, although the defendant reside elsewhere.—*Fitzgerald v. State*, S. C. Tex., June 22, 1888; 9 S. W. Rep. 150.

177. SCHOOLS — Teachers — Certificate. —— Under Michigan law, the secretary of the board of school examiners has no power, four days after a public examination by the school examiners, to grant a special certificate to a person, who has been teaching under a special certificate granted by the secretary, but who failed to pass such examination. — *Lee v. School District*, S. C. Mich , July 11, 1888; 38 N. W. Rep. 867.

178. SCHOOLS—School Districts — Condemnation.—— Construction of Rhode Island statutes relative to schools and school districts, and the condemnation of private property for school purposes. — *Howland v. School District No. 3*, S. C. R. I., July 7, 1888; 13 Atl. Rep. 74.

179. SPECIFIC PERFORMANCE—Diligence—Laches.—— Where, under a contract, the defendant was bound to convey to the plaintiff one-half of a tract of land when he (defendant) got a title thereto: *Held*, that an action for specific performance brought within one year after the defendant got his title was in due season, that plaintiff had used due diligence and was not guilty of

laches.—*McCampbell v. McFaddin*, S. C. Tex., June 5, 1888; 9 S. W. Rep. 138.

180. SPECIFIC PERFORMANCE—Payments—Time.——A sold B a contract he held for the purchase of land. B was to make payments to A at different times, and it was stipulated that the agreement was to be construed strictly as to payments. A payment due July 1 was made July 10, but on July 6 A notified B of cancellation of the agreement. Judgment for specific performance decreed against A.—*Langan v. Thummel*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 782.

181. SPECIFIC PERFORMANCE—Payments — Time.—— Time was held not to be of the essence of the contract, and specific performance was decreed.—*Willard v. Foster*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 786.

182. SPECIFIC PERFORMANCE—Uncertainty—Laches.—Specific performance refused for uncertainty of the alleged verbal agreement and for laches of thirty-two years.—*Northrup v. Stevens*, S. C. Minn., July 3, 1888; 38 N. W. Rep. 810.

183. STATE—State Officers—Warrants—Discounts.—— The holder of a warrant drawn by the comptroller of the State upon the State treasurer, who sells his warrant at a discount because of a want of funds to meet it, cannot hold the State liable for the loss sustained.—*State v. Wilson*, S. C. Tex., June 29, 1888; 9 S. W. Rep. 155.

184. TAXATION—Logs in Transit.——When logs destined and in transit to Port Huron, while lying in the boom at the mouth of the Rifle river, are assessed in that township, and the town officers were informed by letter and otherwise that the logs were in transit, such assessment is void, under Michigan law.—*Brooks v. Arenac Tp.*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 907.

185. TAXATION—Sales—Purchaser.——A sale of land for taxes by the county treasurer, made directly to himself or to a firm of which he is a member, is absolutely void.—*Spicer v. Rowland*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 908.

186. TAXATION—Tax-title — Evidence. ——A tax-deed of forfeited lands is not *prima facie* evidence of title, and must recite a compliance with all the terms of the power.—*Bonham v. Weymouth*, S. C. Minn., July 3, 1888; 38 N. W. Rep. 805.

187. TRESPASS TO TRY TITLE—Statute. —— The statute of Texas, which requires that the action to try title must be brought in the county in which the land is situated, does not apply to a case where the land is situated in two counties and the interest of the parties and their respective titles to the land are identical.—*Heirs of Pevis v. Armstrong*, S. C. Tex., June 15, 1888; 9 S. W. Rep. 134.

188. TROVER—Demand—Commencement of Action.—— Where, in an action of trover, a demand is necessary, the service of the writ, and not its issuance, is the commencement of the action.—*Cross v. Barber*, S. C. R. I., July 7, 1888; 15 Atl. Rep. 69.

189. VENDOR—Refusal to Convey—Interest.—— When a vendor refuses to convey realty according to contract, and retains possession, he will not be allowed his interest, though the rent and profits were less.—*Crockett v. Gray*, S. C. Kan., July 7, 1888; 18 Pac. Rep. 905.

190. VENUE—Change—Attorney's Residence. —— Under Michigan law, a case cannot be removed to the county of the residence of an attorney, who is not the attorney of record.—*Stinson v. Michigan S. Co.*, S. C. Mich., July 11, 1888; 39 N. W. Rep. 14.

191. WATERS—Equitable Relief—Payment.——Where defendant spent $50,000 in the improvement, believing a condemnation statute under which he was acting to be constitutional, and plaintiff did not sue for damages for overflowing his land till four years after the construction of the dam, it was held that the case was a proper one for a pecuniary compensation, and not for an order abating the dam.—*Miller v. Cornwell*, S. C. Mich., July 11, 1888; 38 N. W. Rep. 912.

192. WAYS—Private Ways—Obstruction—Nuisance.—— The obstruction of a private way is a private nuisance. The magistrates and the ordinary have concurrent jurisdiction of the subject.—*Holmes v. Jones*, S. C. Ga., May 14, 1888; 7 S. E. Rep. 168.

193. WILL—Construction. —— The terms of a will stated, under which it was held that the widow took the whole estate, except the property given in specific legacies, but subject to defeasance by her remarriage. Statement of the disposition of the estate in the event of such remarriage.—*Squier v. Harvey*, S. C. R. I., May 19, 1888; 14 Atl. Rep. 862.

194. WILL—Construction.—— Where a daughter received $1,000 from her father, and gave a receipt describing her money as part of her share, and referring to his will, and he made a later will giving her $1,400, and still later by a codicil gave her $600: *Held*, that the last will was the latest utterance, and that she was entitled to the amount given her by it.—*Chapman v. Allen*, S. C. Err. Conn., April 9, 1888; 14 Atl. Rep. 780.

195. WILL—Construction — Conditional Limitations.—A devise to C, "if she should have living issue," if not, then over, vests in C the fee upon the death of the testator, after the birth to C of living issue, though such issue did not survive C.—*Clough v. Clough*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 127.

196. WILL—Construction—Executor.——Where, by a will, two executors were appointed, and power given to either of them, in case of the resignation of the other, to appoint, with the concurrence of the probate judge, a successor to the resigning executor: *Held*, that the declination of the office by one executor before qualifying was equivalent to a resignation, and his successor might be appointed according to the terms of the will.—*Bishop v. Bishop*, S. C. Err. Conn., May 25, 1888; 14 Atl. Rep. 808.

197. WILL—Construction—Mistake. —— Circumstances stated stated under which it was held upon the construction of a will that a clerical mistake in the main body of the will, which indicated that one of the parties was excepted from the operation of the will, was corrected by a subsequent clause, and that party was held not to have been so excepted.—*In re Swinburne*, S. C. R. I., April 28, 1888; 14 Atl. Rep. 850.

198. WILL—Construction—Specific Devise — Statute.—Construction of South Carolina statutes relative to the after-acquired property of the testator and its liability to the payment of debts, and also the relative liability to debts of lands acquired previous to the execution of the will.—*Floyd v. Floyd*, S. C. S. Car., July 2, 1888; 7 S. E. Rep. 42.

199. WILL—Contest—Witness—Evidence. —— Where the propounder of an holographic will, being examined as a witness, was asked whether other persons besides himself knew of the will, answered that he had told two or three persons about it: *Held*, that this answer was not responsive, and should have been striken out.—*Brown v. Hall*, S. C. App. Va., July 19, 1888; 7 S. E. Rep. 182.

200. WILL—Intention of Testator.—— In deeds or will the intention of the grantor or testator, as manifested by the writing in connection with surrounding circumstances, must be carried into effect, so long as no rule of law is violated or sound policy disturbed.—*McCulloch v. Valentine*, S. C. Neb., July 3, 1888; 38 N. W. Rep. 854.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES ANSWERED.

QUERY No. 10 [27 *Cent. L. J. 348.*]

Six years ago, A B and C were tenants in common of a tract of land. C has within a month last past attained his majority. At that time, *i. e.*, six years ago, A and B, either being ignorant of C's title or wilfully disregarding it, caused a partition to be made between themselves of the whole tract by a decree of court, in an action to which C was not a party. They have since held adverse possession of their allotted parcels against each other for more than five years, the period of limitation, the statute, however, saving the rights of minors. Such adverse possession in this State vests or gives title, but does not bar an action by C for partition: 58 Cal. 590. What are the rights and remedies of C? Is, as I presume it is, the partition void as to him? If he should now bring suit for partition what, if any, would be the effect, as between A and B, of first, the former decree; second, the adverse possession? Would it be possible to allot to C all of his segregated tract wholly within either one of the tracts of A and B, as allotted to them in the former decree? If so, how and from what tract is that party (A or B as the case may be,) to be compensated for the land awarded to C? Is a decree in partition binding upon any party unless all the tenants in common were parties to the action in which it was rendered?

LEX.

Answer. C can, of course, bring a suit for partition, or can apply to a court of equity to set aside the decree as founded in a mistake of fact: Freeman on Cotenancy and Partition, § 534; Ross v. Armstrong, 25 Tex. Sup. 372; Pardue v. West, 1 Lea, 729. Of course, in equity, and also in partition (Morenhout v. Higuera, 32 Cal. 289) all disputes between the parties as to their respective interests may be determined. Courts will regard the legal and equitable rights of the tenants in common and their alienees in making partition, so far as practicable, without interfering with another's rights: 1 Story Eq. Jur. 656*c*. As between A and B there is an implied warranty that, in case of eviction, compensation shall be made, and, if necessary, a court of equity will decree a pecuniary compensation: Sawyers v. Cator, 8 Humph. 256. In such case the statute of limitations does not begin to run till such eviction: Sawyers v. Cator, *supra*. Until the first decree of partition is set aside, as above suggested, it is binding on A and B: 1 Story's Eq. Jur. § 656.

L. L.

RECENT PUBLICATIONS.

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JETSAM AND FLOTSAM.

HUMOR BEFORE THE COURT.—Lord Eldon says he was once with Mr. Justice Gould when the latter way trying a case in York. The legal celebrity had been growing more eloquent for two hours, when he stopped short and exclaimed: "Why, sir, how's this? There are but eleven jurymen in the box. Where's the twelfth?" "Please you, my lord," meekly remarked one of the eleven, "he's gone away about some business, but he left his verdict with me."

LAWYERS IN HONGKONG.—A firm of solicitors in Hongkong write: "A local magistrate of Hongkong, who is not a lawyer and seems to have an antipathy to legal gentlemen appearing before him in the police court, has openly expressed his determination to give his decision, if possible, against the side taking legal assistance. We wonder what he does in any case in which each side is represented."

A CASE was being tried in court, and the particular question at issue was the number of persons present when a certain event occurred. An honest but simple-minded German was on the stand.

He had never taken an oath before, and was not a little disconcerted. The lawyer who conducted the cross-examination saw his opportunity, and badgered him with questions after the manner of his kind.

"How many did you say there were present?" he shouted, bringing his fist down upon the table as though the fate of empires trembled in the balance.

"Vell," meekly answered the witness, "off course I gould not chust say, but I dinks dere was between six and sefen."

"Tell the jury what you mean by that!" roared the lawyer. "How could there be between six and seven?" Were there six or were there seven?

"Vell," answered the witness, "maybe I was wrong. There was more as six, but dere vas not so much as sefen. One was a fery leetle boy.